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IN THE

United States Court of Appeals

For the Third Circuit

No. 12,241

UNITED STATES OF AMERICA

vs.

HENRY KISSINGER

BRIEF FOR APPELLANT AND APPENDIX

Appeal from the Order and Judgment of the United States District Court for the Middle District of Pennsylvania at Civil Action No. 5485.

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[In order to assist the Court in the references to the Memorandums of Law of the Plaintiff and Defendant submitted to the Lower Court and attached hereto as an Appendix, we are including in this Brief a Table of Citations in these two memorandums.]

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STATEMENT OF QUESTIONS INVOLVED

(1) Does the defendant have a right to show by *evidence* that the Agricultural Adjustment Act of 1938 has failed in regard to wheat, and that therefore its enforcement in regard to wheat violates due process?

(2) Does the First Amendment protect a man in the exercise of his religious duty to make the fullest use of his talents, both personal and property?

(3) Can a motion for summary judgment be granted under Rule 56 of the Federal Rules of Civil Procedure where a constitutional issue has been raised involving disputed facts?

(4) Should the opinions of the United States District Court meet the standards of Canon 19 of the Canons of Judicial Conduct of the American Bar Association?

STATEMENT OF THE CASE

This is an appeal from an Order of the United States District Court for the Middle District of Pennsylvania, granting plaintiff's motion for summary judgment and imposing upon the defendant a civil penalty for violation of the wheat quota provisions of the Agricultural Adjustment Act of 1938 (hereinafter called Act).

In its complaint, the Department of Agriculture alleges that the Secretary of Agriculture allotted the plaintiff a quota of 16 acres of wheat for the crop year 1954, and that defendant planted 20 acres of wheat in this crop year, and therefore owes the government a civil penalty of $47.04. In the defendant's answer, the defendant (1) denies that he received proper notice that his quota for the crop year would be 16 acres; (2) that the defendant considers it morally wrong by reason of his religious training and belief to limit the production of his farm so that it produces less food than the farm can produce from the defendant's reasonable efforts, and (3) that the Agricultural Adjustment Act of 1938 has failed to achieve the objectives set forth in the Act since the time of its enactment, and that therefore its continued enforcement bears no reasonable relation to the objectives sought to be achieved by it, and is therefore a denial of due process in violation of the Fifth Amendment.

The plaintiff, declining to meet the issues raised by the defendant in his answer regarding the failure of the Act, and the defendant's religious convictions, filed a mo-

tion for summary judgment, on the theory that the defendant's answer raised no material issue of fact to be tried. Hearing on the motion for summary judgment was held on June 4, 1956. The attorney for the defendant filed a Memorandum of Law in opposition to the Motion for Summary Judgment on May 31, 1956, and the government filed a Memorandum of Law in support of its Motion for Summary Judgment on February 1, 1957. Both Memorandums of Law gave extended discussion of the issues raised by the defendant in opposition to the motion for summary judgment. They are reprinted in full as an Appendix to this Brief in order to show that the issues were fully presented by the Court below by counsel.

On March 1, 1957, six days after the Supreme Court of the United States had denied certiorari in the case of *United States v. Mumma*, 237 F. 2d 795 (1956), No. 11,887 in your Court (cert. den. 353 U. S. 1003, 77 S. Ct. 562, 1 L. Ed. 2d 548), Hon. Frederick V. Follmer, District Judge issued an Opinion which upheld the plaintiff's motion for summary judgment. As we shall show, the issues in the *Mumma* case differ from those presented in this case. On March 23, 1957, Judge Follmer entered a final Order pursuant to the Opinion filed by him.

Hence this appeal.

The particular provision of the Agricultural Adjustment Act which imposes the penalty which the defendant protests as unconstitutional is found in 7 U. S. Code 1340 (2), which provides as follows:

> "(2) During any marketing year for which quotas are in effect the producer shall be subject to a penalty on the farm marketing excess of wheat. The

rate of penalty on wheat shall be forty five percentum of the parity price per bushel of wheat as of May 21 of the calendar year in which the crop is harvested." (67 U. S. Statutes 151)

The legislative policy of purpose which the wheat quota laws are intended to achieve are contained in 7 U. S. Code 1331, which provides as follows:

"Wheat is a basic source of food for the Nation, is produced throughout the United States by more than a million farmers, is sold on the country-wide market and, as wheat or flour, flows almost entirely through instrumentalities of interstate and foreign commerce from producers to consumers.

Abnormally excessive and abnormally deficient supplies of wheat on the country-wide market acutely and directly affect, burden, and obstruct interstate and foreign commerce. Abnormally excessive supplies overtax the facilities of interstate and foreign transportation, congest terminal markets and milling centers in the flow of wheat from producers to consumers, depress the price of wheat in interstate and foreign commerce, and otherwise disrupt the orderly marketing of such commodity in such commerce. Abnormally deficient supplies result in an inadequate flow of wheat and its products in interstate and foreign commerce with consequent injurious effects to the instrumentalities of such commerce and with excessive increases in the prices of wheat and its products in interstate and foreign commerce.

It is in the interest of the general welfare that interstate and foreign commerce in wheat and its

products be protected from such burdensome surpluses and distressing shortages, and that a supply of wheat be maintained which is adequate to meet domestic consumption and export requirements in years of drought, flood, and other adverse conditions as well as in years of plenty, and that the soil resources of the Nation be not wasted in the production of such burdensome surpluses. Such surpluses result in disastrously low prices of wheat and other grains to wheat producers, destroy the purchasing power of grain producers for industrial products, and reduce the value of the agricultural assets supporting the national credit structure. Such shortages of wheat result in unreasonably high prices of flour and bread to consumers and loss of market outlets by wheat producers.

The conditions affecting the production and marketing of wheat are such that, without Federal assistance, farmers, individually or in cooperation, cannot effectively prevent the recurrence of such surpluses and shortages and the burdens on interstate and foreign commerce resulting therefrom, maintain normal supplies of wheat, or provide for the orderly marketing thereof in interstate and foreign commerce.

The provisions of sections 1331-1339 of this title affording a cooperative plan to wheat producers are necessary in order to minimize recurring surpluses and shortages of wheat in interstate and foreign commerce, to provide for the maintenance of adequate reserve supplies thereof, and to provide for an adequate flow of wheat and its products in interstate and

foreign commerce. The provisions hereof for regulation of marketings by producers of wheat whenever an abnormally excessive supply of such commodity exists are necessary in order to maintain an orderly flow of wheat in interstate and foreign commerce under such conditions." (Feb. 16, 1938, 3 p.m., c. 30, Title III, 331, 52 Stat. 52.)

This appeal is limited to the issues set forth in the Statement of Questions Involved.

ARGUMENT

I. THE DEFENDANT HAS A RIGHT TO SHOW BY EVIDENCE THAT THE AGRICULTURAL ADJUSTMENT ACT OF 1938 HAS FAILED IN REGARD TO WHEAT, AND THAT THEREFORE ITS ENFORCEMENT IN REGARD TO WHEAT VIOLATES DUE PROCESS

Where the enforcement of legislation does not reasonably tend to accomplish a lawful objective, and it deprives an individual of property, it violates the Fifth Amendment. For it is not due process to take property from an individual *without reason.*

The reasonable relation between the enforcement of the legislation and the lawful objective of the Act may be disputed by two methods—(1) by theory, and (2) by the facts. Heretofore, the reasonable relationship between the enforcement of the Agricultural Adjustment Act of 1938, and the purposes sought to be accomplished therein have been challenged in theory, as in *Secretary of Agriculture v. Central Roig Co.*, 338 U. S. 604, 70 S. Ct. 403, 94 L. ed. 381 (1950). Judge Follmer in the Order in the lower court is of the opinion that in *U. S. v. Mumma*, 237 F. 2d 795 (1956), cert. den. 353 U. S. 1003, 77 S. Ct. 562, 1 L. Ed. 2d 548, before this court at Docket No. 11,887, we challenged the reasonable relation between the purpose of the Act and the enforcement of it. We argued deprivation without due

process, but for another reason—that individuals had a certain property in things which was not subject to regulation in pursuit of economic theories, even the regulation in question might be reasonably related to the end sought. We did not argue whether the economic theory involved in the regulation of wheat was reasonable, either in the abstract or the concrete.

We are not seeking to argue this case in the abstract. We are seeking to get facts upon which to argue it in the concrete. The lower court would not receive evidence so the issue could be decided in the concrete.

In the abstract, it is decided that the theories of economic regulation involved here are reasonable. We question this; but we do not argue it here. As Mr. Justice Frankfurter said in the *Central Roig* case, supra,

> "Congress was thus confronted with the formulation of policy peculiarly within its wide swath of discretion. It would be a singular instrusion of the judiciary into the legislative process to extrapolate restrictions upon the formulation of such an economic policy from those deeply rooted notions of justice which the Due Process Clause expresses. (338 U. S. 617)
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> • • •
>
> "Expressions of dissatisfaction by the Executive and in some quarters of Congress that the refined sugar quotas were 'arbitrary', 'discriminatory' and 'unfair' may reflect greater wisdom or greater fairness than the collective wisdom which put this Act on the statute books. But the issue was thrashed out in

Congress; Congress is the place for its reconsideration." (338 U. S. 619)

However, it is quite another thing to take this language to mean that the policies of Congress need not *in practice* be reasonably related to their professed objective. Congress may have a right in the abstract to adopt such policies; it does not have a right to persist in them when experience shows them to be unreasonable and a failure.

The objectives to be accomplished by the wheat quota provisions of the Agricultural Adjustment Act have been set forth in the Statement of Facts. We are prepared to show that in the twenty years operation of the Act of 1938, none of these objectives have been accomplished.

Even the present Secretary of Agriculture, Ezra T. Benson, admitted to the press the other day that 25 years and 12 billion dollars later, the farm problem was not solved. Mr. Benson said: "These costs undoubtedly would be borne willingly if the program solved the problems, but the problems have not been solved." Mr. Benson, though he admits the failure of the farm program, still seeks to collect a penalty of $47.04 from this defendant.

Nor are increased federal expenditures likely to solve it. It is estimated that 5 billion of the 12 billion disposable cash income of American Farmers this year will come from federal subsidies, and more has been spent on agricultural subsidies in the last four years than in the preceding twenty. And increased penalties upon non-conforming will not solve the problem in the face of the futility of such enormous expenditures.

The failure of the program is notorious—so much so that the courts could almost take judicial notice of it—but

we sought and still seek to prove this failure by admissible evidence and were not permitted to do so. The failure of this agricultural program is flagrant in the public press. Witness the failure of the wheat program as shown by the article on page 1, section 3 of the New York Times for April 14, 1957, which we reproduce in the Appendix. Or the failure of the farm program in general shown by the article reproduced from page 15, of the Harrisburg Sunday Patriot News for April 21, 1957, also the article from page 1 of the York Gazette and Daily for May 3, 1957.

We believe the failure and futility of the wheat program is a justiciable issue of fact upon which the lower court should have received evidence. Now if it be decided here that these facts were matters of which the lower court could and did take judicial notice, then we submit to this court that its finding was contrary to the clear and indisputable weight of the evidence!

We have very little to add to what we have said in Part III of our Memorandum of Law before the lower court, which we have attached hereto as an Appendix. Since the government in its Memorandum of Law before the lower court has differed with us in our interpretation of *United States v. Carolene Products Co.*, 304 U. S. 144, 58 S. Ct. 779, 82 L. ed. 1234 (1938), and *Snowden v. Hughes*, 321 U. S. 1, 64 S. Ct. 397, 88 L. ed. 497 (1944), we shall say a word about them. In the *Carolene* case, Mr. Justice Stone said:

> "Where the existence of a rational basis for legislation whose constitutionality is attacked depends upon facts beyond the sphere of judicial notice, such *may* properly be made the subject of judicial inquiry." (304 U. S. 153) (Emphasis added)

In the case of *Snowden v. Hughes*, supra, Mr. Chief Justice Stone said:

> "The unlawful administration by state officers of a state statute fair on its face, resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection, unless there is shown to be present in it an element of intentional or purposeful discrimination. This may appear on the fact of the action taken with respect to a particular class or person * * * *or it may only be shown by extrinsic evidence*, showing a discriminatory design to favor one individual or class over another not to be inferred from the action itself." (321 U. S. 8) (Emphasis added)

The government's counsel in its reply Memorandum of Law in the lower Court contended that the word "may" meant that it was in the discretion of the court as to whether evidence would be received or not. It is true that the word "may" implies "discretion". But the question is *whose* discretion, the discretion of the court or of the litigant? We think the clear meaning of these cases is that it means the *litigant MAY* introduce such evidence in such cases if it wishes, and the *court must* receive it, as we contended in the Memorandum of Law in the lower court.

Our interpretation of these cases is confirmed by Mr. Justice Butler in *Weaver v. Palmer Bros. Co.*, 270 U. S. 654, 46 S. Ct. 320, 70 L. ed. 654 (1925), where he said:

> "Legislative determinations expressed or implied are entitled to great weight; *but it is always open to interested parties to show that the Legislature has transgressed the limits of its power.* * * * Invalidity

> *MAY be shown by things which will be judicially noticed* • • • or • • • *established by evidence.*" (270 U. S. 410) (Emphasis added)

We think this quotation clearly indicates the meaning of the word "may". It is always open to interested parties to show the invalidity of a law—and they have two choices of method—facts which will be judicially noticed, or evidence. If the litigant chooses to present evidence, the court must hear it. This was not done in the lower court.

The only instance in which a court need not hear evidence on whether the enforcement of an act has transgressed constitutional power is when admitting the facts which the litigant seeks to present in evidence, the constitutional issue must be decided against him.

If this court is prepared to decide that even though the wheat quota laws have utterly failed to accomplish their professed objectives, they do not deny the defendant due process in imposing a penalty on him, then we concede we are not entitled to a hearing on this question. If however the admitted failure of the agricultural laws as applied to wheat over a period of twenty years would make them invalid, then we have a right to a hearing to show this.

We will just say one thing more on this question. If the defendant cannot get a hearing to show that Congress has failed in the purposes of its legislation, it will in effect abrogate the power of the judiciary in our system as far as constitutional questions are concerned. All that Congress needs to do to extend its powers would be to declare that it is enacting some law because it believes in a particular theoretical rationale. The theory may not be true,

it may not work. That will not matter, if the courts intentionally blind themselves to the facts of failure, and say that it is a matter of "policy" what theories Congress adopts, and these theories are not judicially to be questioned so long as these theories are pleasing to the courts. This means that instead of having our government anchored by the realities of sober fact, we will have it abroad on the sea of the prejudices of the hour. Facts are important. Facts should govern the application of the law. And as the legislature has a duty to look at facts before it enacts fancies into law, so do the courts have a duty to look at facts to see whether the fancies of the legislature are beyond reason. It is not enough for the courts to share the fancies of the legislature to make an act constitutional. The courts must do their duty and look at the facts first before they say that the fancies of the legislature are within reason. Otherwise, we will be ruled by the tyranny of theory.

II. THE FIRST AMENDMENT PROTECTS A MAN IN THE EXERCISE OF HIS RELIGIOUS DUTY TO MAKE THE FULLEST USE OF HIS TALENTS, BOTH PERSONAL AND PROPERTY

The Christian and Jewish faiths are in agreement that it is a man's religious duty to make the fullest use of his property and talents, and that the wealth and personal abilities which a man enjoys are his only under a stewardship to which he is accountable to God. This duty is taught in the parable of the talents in St. Matthew as follows:

> "For the kingdom of heaven is as a man travelling into a far country who called his own servants

and delivered unto them his goods. And unto one he gave five talents, to another two, and to another one; to every man according to his several ability; and straightaway took his journey. Then he that had received five talents went and traded the same and made them other five talents. And likewise he that had received two, he also gained other two. But he that had received one went and digged in the earth and hid his lord's money. After a long time the lord of those servants cometh, and reckoneth with them. And so he that had received five talents came and brought other five talents, saying, Lord, thou deliverest unto me five talents; behold, I have gained beside them five talents more. His lord said unto him, Well done, thou good and faithful servant; thou has been faithful over a few things, I will make thee Ruler over many things: enter thou into the joy of thy lord. He also that had received two talents came and said, Lord, thou deliverest unto me two talents; behold, I have gained two other talents beside them. His lord said unto him, well done, thou good and faithful servant; thou hast been faithful over a few things, I will make thee ruler over many things: enter thou into the joy of thy lord. Then he which had received the one talent came and said, Lord, I knew thee that thou art a hard man, reaping where thou hast not sown, and gathering where thou has not strawed: And I was afraid, and went and hid thy talent in the earth: lo, there thou hast that is thine. His lord answered and said unto him, Thou wicked and slothful servant, thou knewest that I reap where I sowed not, and gather where I have not strawed: Thou oughtest therefore to have put my

money to the exchangers, and then at my coming I should have received my own with usury. Take therefore the talent from him and give it unto him which hath ten talents. For unto every one that hath shall be given, and he shall have abundance; but from him that hath not shall be taken away even that which he hath. And cast ye the unprofitable servant into outer darkness: there shall be weeping and gnashing of teeth." (Matthew 25:14-31)

The Jewish teaching on the moral duty of labor is well illustrated by the following passage from the Talmud:

"The Emporer Hadrian was passing along the lanes near Tiberias and saw an old man breaking up the soil to plant trees. He said to him, 'Old man, if you had worked early there would have been no need for you to work so late in your life.' He replied, 'I have toiled both early and late, and what was pleasing to the Lord of Heaven has He done with me.' Hadrian asked him how old he was, and the answer was a hundred; he thereupon exclaimed, 'You a hundred years old and you stand there breaking up the soil to plant trees! Do you expect to eat of their fruit?' He replied, 'If I am worthy I shall eat; but if not, as my fathers laboured for me, so I labour for my children.'" (Lev. R. xxv. 5)

Religious freedom under the First Amendment has been held to embrace two concepts (1) freedom to believe and (2) freedom to act. *Cantwell v. Connecticut*, 310 U. S. 296, 303-304, 60 S. Ct. 900, 84 L. ed. 1213 (1940), and *Reynolds v. United States*, 98 U. S. 145, 1 S. Ct. 319, 25 L. ed. 244. The first freedom is said to be absolute and the sec-

ond freedom to be qualified by the necessary regulations for the protection of society. This is an oversimplification. Certainly in this country there is a degree of absolute freedom of public worship—and while worship may not be taken to mean every form of public assembly—neither can it be limited to right of a man to think what he pleases. Every man even in a totalitarian country has the right to think what he pleases (and the Communists will tell you the Soviet Union has religious freedom because of this fact)—unless he is being "brainwashed" or subjected to brain surgery. Religious liberty in the United States cannot be limited to that of countries such as Spain where public worship for all but the established church is prohibited by law. The free exercise of religion comprehends a certain degree of absolute freedom to *act*—the question before this court is what degree of action is to be protected under the First Amendment.

It is very evident that in some instances professed doctrines of religious belief sincerely held enable a man to set at nought the law of the land. This is evident in right of Jehovah's witneses to refuse salute to the flag. *Board of Education v. Barnette*, 319 U. S. 624, 63 S. Ct. 1178, 87 L. ed. 1628 (1943); in the refusal of a person to serve on a jury for conscientious reasons, *U. S. v. Hillyard*, 52 F. Supp. 612 (1943). Nor may a person be deprived of property because his professed religious beliefs offend the government. *Jinsha v. McGrath*, 90 F. Supp. 892 (1950). And a Christian Scientist is free to refuse medical treatment unless his contagion threaten the health of the community.

The question is—how much are the activities at issue those of commerce, and how much are they those of re-

ligious practice. If the acts are primarily religious, they fall within the protection of the First Amendment, even though they may have commercial overtones. In *Mitchell v. Pilgrim Holiness Church Corporation*, 210 F. 2d 879 (1954), cert. den. 347 U. S. 1013, 74 S. Ct. 867, 98 L. ed. 1136, it was held that the publishing activities of the church were primarily commercial and not religious and that therefore the Fair Labor Standards Act applied to the employees of the publishing business. This case fell on the commercial side of the line.

In *Wicks v. Southern Pc. Co.*, 121 F. Supp. 454 (1954), affirmed 231 F. 2d 130 (1956), cert. den. 351 U. S. 946, 76 S. Ct. 845, 100 L. ed. 1471, which we believe to be the latest case on the question, it was held that a railroad must discharge an employee who was not a labor union member and had religious scruples against joining a labor union, where the railroad had a union shop. The case too fell on the commercial side of the line, although the decision seems questionable, since the religious discipline of many churches precludes membership in other organizations. A Roman Catholic and a member of the Missouri Synod of the Lutheran Church may not receive the sacraments if they belong to the Masons. And surely it would be to violate the First Amendment to require a railroad to hire only Masons if such a labor contract were arrived at through collective bargaining!

The question before this court is whether the activity in question—the planting of wheat—is primarily a religious or commercial activity. Until the wheat gets out of the hands of the farmer, we contend that the growing of it is a religious act—particularly for one who feels a

religious obligation to labor according to the teachings of the Christian and Jewish religions. The defendant feels a duty to God to raise it. The moral character of the act of raising the wheat is essentially no different than the act of a monk in a monastery doing penance—and surely it cannot be contended that the government can regulate *that* as commerce—under some such sophism as the labor market is being deprived of the supply of his labor while he does penance.

In the government's law memorandum in the District Court which we have published in our Appendix, it was contended that there was no restriction upon the defendant to *plant* all the wheat he desired. The penalty was argued to be upon the *failure to turn the threshed wheat over to the government.* This is sophistic. The purpose of the law—and the only justification of it under the Commerce power of the federal government under the Constitution—is that the law reduce the supply of wheat by reducing the planting of it. The penalty under the law attaches from the moment the wheat is planted. (The regulations are prolix and complex, but we state the practical operation of the law fairly when we state the penalty attaches the moment the wheat is planted.) Now the penalty may thereafter be *avoided* by the farmer by taking certain *positive* actions, among them turning the wheat over to the government.

Well, now it will be asked, why doesn't the defendant turn over his wheat to the government? Does he have a religious scruple against that also? Yes, he does. He is incensed at a law which requires him in its practical operation to violate his religious duties. He feels he cannot conscientiously recognize the validity of this law in one

particular and deny it in another. He feels he cannot consistently plant the wheat and then, to avoid the penalty for doing his religious duty, turn the wheat over to the government. This would be, he feels, the submission to the law contrary to the dictates of religious duty. He feels he cannot conscientiously make this submission and that this would be as immoral as if he didn't plant the wheat.

In conclusion, consider the practical effect of the operation of the law upon the defendant. Every year the defendant out of religious conviction will plant that amount of wheat which in his judgment is necessary in order to obtain the most fruitful yield of his land and labors, which will probably be more than his quota. Every year the government will assess a penalty against the defendant for planting too much wheat. The defendant cannot sell his wheat. He cannot sell his wheat even though this year he does not exceed his quota, since he must have a marketing card, and he cannot get a marketing card until he pays the unpaid penalties for all the years past. In this grim struggle, the operation of the law can only be to the defendant's economic loss and ruin. It must invariably cost him more to plant and reap the wheat than he can realize after he uses it (even if he feed it to livestock and cattle, for the selling price of the livestock and cattle will not equal the cost of raising the grain *and* paying the penalty). How long shall this unyielding struggle go on? It will go on until one or the other of the parties is exhausted. And which party will that be? It will be the defendant, for the powers of the government are inexhaustible. The officials of the government come and go, and a new official replaces the one who dies or retires, but government endures, and

the law will be enforced unto its minutest exaction even though the law offend the individual conscience of the officials, for officials take no personal responsibility for the fact that he is called upon to enforce what is in his opinion, an immoral law. With the power of taxation, the official will never want the means to enforce this law upon the defendant, if the government does not exact its penalty from the defendant in his life, it will exact its penalty on his estate after death. Ultimately, the government will work its will. The defendant's bruised flesh, his broken body, will lie at the feet of the government, drained of sustenance. A victim. For what? For the pride of men who believe that they and not God can regulate the produce of the field. And a martyr to the conviction that he is answerable as a steward to God and not to man for the use of his labors and property.

Does the peace, order and well-being of society require that a man should make such a sacrifice to maintain the practice of his religious convictions, and in particular the practice of religious convictions sanctified by the Judeo-Christian heritage of our civilization?

III. CAN A MOTION FOR SUMMARY JUDGMENT BE GRANTED UNDER RULE 56 OF THE FEDERAL RULES OF CIVIL PROCEDURE WHERE A CONSTITUTIONAL ISSUE HAS BEEN RAISED INVOLVING DISPUTED FACTS

We have little to add to what we have said in Part II of our Memorandum of Law submitted to the lower court which is printed hereto as an Appendix. We do not agree

with the government's Reply Memorandum of Law that the motion for summary judgment could be granted because "'the constitutional issues are settled". We pointed out that we agree, de arguendo, that the constitutional issue has been settled in the abstract—that is, that Congress can regulate the planting of wheat in order to regulate the supply of it for the interstate market. However, we do not agree that the issue has been settled in the concrete—namely have the regulations of Congress in fact failed to create an orderly supply of wheat for the interstate market? We sought to show that the Agricultural Adjustment Act of 1938 failed to achieve its objectives as applied to wheat. The Constitutional issue, admitting the failure of the Act to achieve its aims, has not been decided, let alone settled, either by the Supreme Court, or for that matter by any other court to the knowledge of this counsel.

IV. SHOULD THE OPINIONS OF THE UNITED STATES DISTRICT COURTS MEET THE STANDARDS OF CANON 19 OF THE CANONS OF JUDICIAL CONDUCT OF THE AMERICAN BAR ASSOCIATION

As we stated, we raised two questions of constitutionality in our Memorandum of Law—the first dealing freedom of religion under the First Amendment, and the second dealing denial of due process under the Fifth Amendment, because the Act has failed to achieve lawful purposes and thus violates due process.

The Court met these arguments as follows in its Opinion:

"There is therefore no genuine or material issue of fact. On the facts pleaded plaintiff is clearly entitled to judgment. Defendant's main reliance appears to be on the questions of the constitutionality of the Act. This precise issue was before the Court of Appeals of this Circuit in United States v. Mumma, 3 Cir., 237 F. 2d 795, cert. den. Feb. 26, 1957, not yet reported, and that court there said 'Appellant's sole contention is that the Act is unconstitutional. In line with this, she argues that Wickard v. Filburn, 1943, 317 U. S. 111, 63 S. Ct. 82, 87 L. Ed. 122, which upheld the constitutionality of the Act and the cases which followed that decision, including our own Blattner v. United States, 3 Cir., 1955, 223 F. 2d 468, were all decided erroneously. We disagree with that view.'"

As we have pointed out, we have *not* raised the *same* issues in this case as we raised in the *Mumma* case. While it is not reasonable to expect judges always to be sufficiently astute to comprehend the exact questions placed at issue before them, nevertheless, we do not feel that this opinion of the lower court which we have just quoted, fairly disposes of the issues raised in this case in the way which is to be expected of the Court. We have reprinted in full the Memorandums of Law of both the plaintiff and the defendant, so that this Court can fairly appraise the issues presented to the lower court.

Under Canon 19 of the Code of Judicial Ethics of the American Bar Association, it is the duty of judges in their opinions to meet fairly the issues raised by counsel. Chief Judge Biggs of this court was a member of the Committee which drafted these Canons. Canon 19 provides:

"In disposing of controverted cases, a judge should indicate the reasons for his action in an opinion showing that he has not disregarded or overlooked serious arguments of counsel. He thus shows his full understanding of the case, avoids the suspicion of arbitrary conclusion, promotes confidence in his intellectual integrity and may contribute useful precedent to the growth of the law.

It is desirable that Courts of Appeals in reversing cases and granting new trials should so indicate their views on questions of law argued before them and necessarily arising in the controversy that upon the new trial counsel may be aided to avoid the repetition of erroneous positions of law and shall not be left in doubt by the failure of the court to decide such questions.

But the volume of reported decisions is such and is so rapidly increasing that in writing opinions which are to be published judges may well take this fact into consideration, and curtail them accordingly, without substantially departing from the principles stated above.

It is of high importance that judges constituting a court of last resort should use effort and self-restraint to promote solidarity of conclusion and the consequent influence of judicial decision. A judge should not yield to pride of opinion or value more highly his individual reputation than that of the court to which he should be loyal. Except in case of conscientious difference of opinion on fundamental principle, dissenting opinions should be discouraged in courts of last resort."

Inasmuch as we do not feel we have from the lower court an opinion on the issues we raised before it, we request this court, whether it decides the case for us or against us, to come forward with an opinion which explicitly and fairly meets the issues which we have raised in this case.

Respectfully submitted,
ANDREW WILSON GREEN,
Attorney for Appellant.

APPELLANT'S APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

No. 5485 Civil

United States of America,
Plaintiff

vs.

Henry Kessinger,
Defendant

I.

RELEVANT DOCKET ENTRIES

1955

Dec. 9, Complaint.

Dec. 9, Summons issued returnable 20 days after service. Copy of complaint, summons and copy, handed U. S. Marshal.

Dec. 9, J. S. 5.

Dec. 14, Summons returned served 12-13-55, together with copy of complaint. (M F & E $7.60)

Dec. 31, Answer.

Docket Entries

1956

May 10, Motion for Summary Judgment, and Notice tha said Motion will be brought on for a hearing Monday June 4, 1956, at 11:00 a.m. at Williamsport, Pennsylvania, and Certificate of service thereon.

May 25, Plaintiff Affidavits in support of Motion for Summary Judgment, and Praecipe to file same, and Statement of service thereon.

May 31, Praecipe to file Memorandum of Law in the Nature of an Answer and Argument to plaintiff's Motion for Summary Judgment.

May 31, Defendant's Memorandum of Law in the nature of an answer and argument to the plaintiff's motion for Summary Judgment.

June 4, Clerk's Minute Sheet—rehearing on Motion for Summary Judgment. (F)

1957

Mar. 1, Opinion, the motion for summary judgment will be granted. Let order be submitted accordingly. (F)

Mar. 1, Copies of opinion mailed counsel of record.

Mar. 15, Defendant's Notice of Appeal.

Mar. 22, Order of Court: Now, this 22nd day of March, 1957, the above matter having come before the Court on Motion of the Plaintiff for Summary Judgment under Rule 56 of the F. R. C. P., and the Court by Opinion dated March 1, 1957, having granted the Motion for Summary Judgment in favor of the Plaintiff, and against the Defendant, it is hereby, ordered, adjudged and decreed, that the Summary Judgment be entered in favor of the United States of America, and

against the Defendant, Henry Kissinger, in the sum of Forty Seven Dollars and Four Cents ($47.04), plus the costs of suit. (FVF) (Cost, $42.60)

Mar. 22, Copies of Order mailed counsel of record.

Mar. 22, J. S. 6.

Mar. 26, Copies of Notice of Appeal mailed to U. S. Attorney and the U. S. Court of Appeals for the Third Circuit.

Mar. 28, Card acknowledging receipt of Notice of Appeal, from the United States Court of Appeals.

Apr. 15, Entire files mailed to United States Court of Appeals, Third Circuit, Philadelphia, Penna.

Apr. 18, Receipt from the U. S. Court of Appeals, Third Circuit, acknowledging files received.

Apr. 25, Notice of Appeal from order entered 3-22-57.

Apr. 25, Designation of record on appeal.

Apr. 26, Supplemental record on appeal mailed to circuit ct.

Apr. 29, Receipt for supplemental record on appeal.

II.

COMPLAINT

Plaintiff, for cause of action against defendant, alleges:

I.

That J. Julius Levy, United States Attorney for the Middle District of Pennsylvania, acting under the direction of the Attorney General, upon request of the Secretary of Agriculture, hereinafter referred to as "the Secretary", brings this complaint under the provisions of the Agricultural Adjustment Act of 1938, as amended and supplemented (7 U.S.C. 1281 to 1393; Act of January 30, 1954, 68 Stat. 4; and Act of August 28, 1954, 68 Stat. 897), hereinafter referred to as "the Act", to collect penalties provided in the Act from defendant. This Court has jurisdiction of the subject matter of this action under the provisions of Section 376 of the Act (7 U.S.C. 1376), and Title 28, United States Code, Section 1345. Defendant, whose mailing address is Millersburg, resides in Dauphin County, in said State, and within the jurisdiction of this Court.

II.

After the performance and occurrence of all conditions precedent the marketing quota provisions of the Act were made effective with respect to the 1954 crop of wheat for the marketing year beginning July 1, 1954 (7 U.S.C. 1301, 1332, 1333, 1335; 18 F.R. 2417, 3780, 4166; 7 U.S.C. 1336; 18 F.R. 4221, 5707), and pursuant to the Act (7

U.S.C. ~~1375~~) the Secretary issued regulations pertaining to acreage allotments (18 F.R. 2621, 3161, 4047; 19 F.R. 972, 1336, 1562), and marketing quotas (18 F.R. 6711; 19 F.R. 202, 1481, 2763, 6134, 6879, 8500; 20 F.R. 24, 189, 1200) for the 1954 crop of wheat, hereinafter referred to as "the regulations".

III.

Wheat was planted for harvest in 1954 on the farm in Dauphin County, Pennsylvania, identified under the regulations (Reg. Sec. 728.454) by Serial No. 2B-10, hereinafter referred to as "the farm", and all or part of such wheat was harvested prior to January 31, 1955. Defendant, as owner, landlord, tenant or sharecropper, was entitled to all of a share of such crop of wheat or of the proceeds thereof and under the Act and regulations was a producer of wheat on the farm with respect to the 1954 crop (Reg. Sec. 728.451(1)).

IV.

After the performance and occurrence of all conditions precedent and in accordance with the Act and regulations (7 U.S.C. 1334; 18 F.R. 4418; 19 F.R. 4859; Reg. Secs. 728.410-728.424), the Secretary, acting through the Dauphin County Agricultural Conservation and Stabilization Committee, hereinafter referred to as "the committee", established a wheat acreage allotment of 16 acres for said farm for the 1954 crop of wheat and duly gave written notice thereof in accordance with law (7 U.S.C. 1362).

V.

In compliance with the Act and regulations (7 U.S.C. 1301(b)(13)(E); Reg. Sec. 728.453; 7 U.S.C. 1340; Reg.

Secs. 728.451, 728.458, 728.459; 7 U.S.C. 1334; Reg. Secs. 728.410-728.424; 7 U.S.C. 1388), the committee determined for said farm for the 1954 crop of wheat the following facts:

Acreage of wheat	20	acres
Farm wheat acreage allotment	16	"
Excess acreage of wheat	4	"
Wheat normal yield per acre	21	bushels
Normal production of acreage allotment	336	"
Farm marketing excess of wheat	84	"

Written notice of said determinations of facts and that the farm marketing quota of wheat for the 1954 crop for the farm was the amount of wheat produced thereon in 1954, less the farm marketing excess, was duly issued and mailed to defendant by the committee on or about June 2, 1954 (7 U.S.C. 1340; Reg. Secs. 728.458, 728.459; 7 U.S.C. 1362; Reg. Sec. 728.460). The notice informed defendant of the provisions of law relating to a downward adjustment in the farm marketing excess and the review of the farm marketing quota or far marketing excess or any determination made in connection therewith. Defendant failed to apply under the Act and regulations for a downward adjustment in the farm marketing excess determined for the farm (7 U.S.C. 1340; Reg. Sec. 728.461). Defendant further failed to apply for a review by a review committee of the farm marketing quota or farm marketing excess or any of the aforesaid determinations made in connection with said quota or excess as provided in the Act and regulations (7 U.S.C. 1363; Reg. Sec. 728.465).

VI.

In accordance with the requirements of the regulations (Reg. Secs. 728.461, 728.477, and 728.490) the Pennsylvania State Agricultural Stabilization and Conservation Committee, United States Department of Agriculture, determined for the 1954 crop year that the date on which the threshing of wheat is normally substantially completed in Dauphin County, Pennsylvania, is August 16, 1954 (20 F.R. 24). After the issuance of the notice referred to in paragraph V hereof the regulations were amended to provide that the penalty on the farm marketing excess of wheat for any farm should be remitted not later than sixty calendar days after the date on which the threshing of wheat is normally substantially completed in the county in which the farm is situated, as determined by the State committee, or January 31, 1955, whichever is the later, and to provide for appropriate credit for any portion of the farm marketing excess stored or delivered to the Secretary on or before the aforesaid applicable date (Reg. Sec. 728.477 (b), as amended, 20 F.R. 24).

VII.

The parity price per bushel of wheat, as of May 1, 1954, was $2.50, and under the provisions of the Act (7 U.S.C. 1952 ed. Supp. I, Sec. 1340(2)) the rate of penalty applicable to the 1954 crop of wheat is $1.12 per bushel (Reg. Sec. 728.475, as amended, 19 F.R. 2763).

VIII.

Defendant has failed to store or deliver to the Secretary any part of said farm marketing excess in accordance with the Act and regulations (7 U.S.C. 1340 (3); Reg. Sec.

728.482, 728.483). Under the Act and regulations the penalty applicable to the 1954 farm marketing excess of wheat determined for the farm is $94.08, and said sum was required to be paid by defendant not later than January 31, 1955. Under the Act and regulations the defendant and PAUL KEEFER of Millersburg, Pennsylvania, were producers of wheat on said farm Serial No. 2B-10 with respect to the 1954 crop on a 50-50 share basis. On or about April 12, 1955, PAUL KEEFER paid his one-half share of the penalty, $47.04. Defendant has failed to and refused to pay his one-half share of the penalty or any part thereof and no part of said one-half share of the penalty has otherwise been paid.

IX.

WHEREFORE, plaintiff demands judgment against defendant for the sum of $47.04, the costs of this action, and such other relief as this Court may deem just and proper in the premises.

UNITED STATES OF AMERICA

By (s) J. JULIUS LEVY

United States Attorney

III.

ANSWER

And, now, comes the defendant, by his attorney, Andrew Wilson Green, whose address is 603 North Front Street, Harrisburg, Pennsylvania, and alleges in answer to the complaint in the above entitled civil action as follows:

1. Paragraph I of the complaint is admitted.

2. Paragraph II of the complaint is admitted.

3. Paragraph III of the complaint is admitted.

4. Paragraph IV of the complaint is answered as follows: It is admitted that the defendant received notification of 1954 wheat acreage allotment in a form similar to that set forth in Exhibit A, attached hereto and made a part hereof. However, the original notification was inadvertently destroyed by the defendant, and the defendant requested another copy of this notification from the Dauphin County Production and Marketing Administration Committee, who sent him a notification, a copy of which is attached hereto as Exhibit A. However, the defendant believes that the second notification sent to him differs from the first in that the first did not include the words "and for farm marketing quotas if marketing quotas are applicable for the 1954 wheat crop", and also "if marketing quotas are applicable to the 1954 crop of wheat, as underlined on the said Exhibit A, or any other

words pertaining to quotas. Except as hereinabove stated, Paragraph 4 is admitted.

5. Paragraph V of the complaint is answered as follows: It is admitted that the defendant received notice of the determination of facts dated June 2, 1954, but it is to be noted that the said determination of facts was made before the harvesting of the wheat in question. It is admitted that the defendant failed to apply for a downward adjustment of the farm marketing excess, or any of the determinations of fact referred to in Paragraph V of the complaint.

6. Paragraph VI of the complaint is admitted.

7. Paragraph VII of the complaint is admitted.

8. Paragraph VIII of the complaint is answered as follows: It is admitted that the defendant failed to store or to deliver to the Secretary of Agriculture any part of the farm marketing excess. It is admitted that the penalty applicable to the 1954 farm marketing excess on the said farm is $94.08, and it is further admitted that Paul Keefer paid half of the said penalty, or $47.04, and it is further admitted that the defendant has not paid and has refused and continues to refuse to pay the said penalty sought to be enforced against him in the amount of $47.04. However, the defendant denies that as to him, the said Act and Regulations have the force of law.

9. The defendant denies that there is due and owing to the plaintiff the sum of $47.04, or any other sum, and further avers that there is no other relief to which the plaintiff is entitled to against the defendant.

Answer
New Matter

NEW MATTER

10. The defendant, by reason of his religious training and belief, considers it morally wrong and contrary to the teachings of the Holy Scriptures to limit the production of his farm so that his farm produces any lesser amount of food than it can, subject to the knowledge and judgment of farming which God has been pleased to give to the defendant in respect to the farming of his farm.

11. The enforcement of the Agricultural Adjustment Act of 1938, as against the defendant in the manner sought in the complaint, would be contrary to the First Amendment to the Constitution of the United States, which provides that "Congress shall make no law * * * prohibiting the free exercise (of religion) * * *".

12. The Agricultural Adjustment Act of 1938, in respect to wheat quotas, is unlawful, inasmuch as Congress has no power to pass such an Act, under the provisions of clause 3, Section 8, Article I of the Constitution of the United States, or any other provision thereof.

13. The enforcement of the Agricultural Adjustment Act of 1938 is contrary to the provisions of the Fifth Amendment of the Constitution of the United States, which provides that "no person * * * shall * * * be deprived of life, liberty, or property, without due process of law", in the following respects:

(a) The failure of the enforcement of the wheat marketing provisions of the Agricultural Adjustment Act of 1938 to achieve the objectives set forth in the Act since its enactment to the present time, shows that the enforcement of the said Act bears no reasonable

relationship to the objectives sought by it, and that its continued enforcement is contrary to due process of law.

(b) One of the incidents of property is the right to use it as the owner sees fit, subject only to the requirements of the public defense, the public health, welfare, and morals (the police power of the state), and the proper and special regulation of commerce, authorized to Congress by clause 3, Section 8, Article I of the Constitution of the United States. The management of a farm is not an object of or incident to interstate commerce, and therefore, the imposition of a penalty upon the owner thereof in respect to the management of a farm is a deprivation of property without due process of law.

14. Wherefore, the defendant prays (1) that the Court may hear testimony from the defendant concerning his religious training and beliefs, and from experts in the field of religion in respect to the support of the defendant's religious beliefs from the Holy Scriptures, and (2) that the Court may hear testimony from economic experts concerning the failure of the enforcement of the Agricultural Adjustment Act of 1938 to achieve the objects set forth in the Act since its enactment to the present time, and (3) to hear argument concerning the Constitutional questions raised by defendant's answer herein.

And the defendant will every pray, etc.

HENRY KISSINGER, Defendant
By his Attorney:
ANDREW WILSON GREEN

December 30, 1955

Answer
Exhibit A

EXHIBIT A

Copy Copy

Form GR-308-WHEAT (1954)
(4-28-53)

SECOND RUN

UNITED STATES DEPARTMENT OF AGRICULTURE

Production and Marketing Administration

NOTIFICATION OF 1954 WHEAT ACREAGE ALLOTMENT

(State, County Code and farm serial no.) Penna-022-2B-10

(Acreage of land in farm) 109

(Date) 8/10/53

To: (Name and address of operator) Paul Keefer, Millersburg, Penna.

And to all other persons who as operator, landlord, tenant or sharecropper are interested in the above identified farm for which this acreage allotment is established.

A wheat allotment of 16 acres has been established for 1954 for this farm for the purposes of the price support provisions of the Agricultural Act of 1949 *and for farm marketing quotas if marketing quotas are applicable for the 1954 wheat crop.* If there has been any material change in the farm, this allotment shall not be effective; the allotment shall be redetermined by the county committee when such change becomes known to it; and a new notice of the revised allotment shall be given.

Answer
Exhibit A

THE COUNTY COMMITTEE SHOULD BE PROMPTLY INFORMED OF ANY CHANGES IN THE OWNERSHIP, OPERATION, OR CONTROL OF THE FARM IDENTIFIED ABOVE AND OF ANY CHANGES AS A RESULT OF DIVISION, SALE OR RENTING OF PART OF THE LAND OR PURCHASE OR RENTING OF ADDITIONAL LAND.

If any interested producer is dissatisfied with the acreage allotment shown above he may within 15 days after the mailing of this notice appeal for reconsideration of his allotment. The appeal and facts constituting a basis for such consideration must be submitted in writing to the address shown below.

If marketing quotas are applicable to the 1954 crop of wheat and any interested producer is dissatisfied with the acreage allotment shown above he may within 15 days after the mailing of this notice have such allotment reviewed by a local review committee of three farmers appointed by the Secretary of Agriculture. Any such application for review must be in writing and filed with the Secretary of the county committee at the address shown below in accordance with regulations prescribed by the Secretary of Agriculture (7 CFR 711.1-711.34). These regulations are available at the office of the county committee.

Carbon Copy to: (Owner)
Name ——— Adress ———
Henry Kissinger
Millersburg, Penna.

Dauphin County Production and Marketing Administration Committee Brotherhood Bldg., Harrisburg, Pa.

by (s) Wilmer Brubaker

IV.

MOTION FOR SUMMARY JUDGMENT

To the Honorable, the Judges of Said Court:

J. Julius Levy, United States Attorney in and for the Middle District of Pennsylvania, attorney for Plaintiff, moves the Court to grant summary judgment against the Defendant and in favor of the plaintiff, pursuant to Rule 56 of the Federal Rules of Civil Procedure.

J. Julius Levy
United States Attorney
424 Post Office Building
Scranton 1, Penna.

Date: May 10, 1956

V.

MEMORANDUM OF LAW IN THE NATURE OF AN ANSWER AND ARGUMENT TO THE PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

To the Honorable, the Judges of Said Court:

Andrew Wilson Green, attorney for the defendant in the above entitled case, herewith prays leave to submit the following memorandum of law, in the nature of an Answer and Argument to the plaintiff's Motion for Summary Judgment.

The plaintiff herein on May 10, 1956, filed with your Honorable Court a Motion for Summary Judgment, together with a notice that the same will be brought on for hearing before your Honorable Court, sitting in the Post Office Building, Williamsport, Pennsylvania, on the fourth day of June, 1956, at eleven o'clock in the forenoon of that day, or as soon thereafter as the Court will permit.

The purpose of a Motion for Summary Judgment is to decide (1) whether there are material questions of fact at issue to be submitted to the Court. Section 1231 Barron and Holtzhoff on Federal Practice and Procedure, and Moore on Federal Practice, Section 56.04.

A determination as to whether there is a material question of fact at issue naturally breaks itself down into questions: (1) Are there questions of fact at issue, and (2) Are the questions of fact at issue *material?* This last question can be more simply stated in the following form:

Does the decision of the questions of fact at issue affect the outcome of the case? Or, even more simply, in the present case, the inquiry is: Admitting what the defendant pleads to be true, is a judgment in favor of the plaintiff still required? If the plaintiff is entitled to judgment even on the admission of the facts pleaded by the defendant, then the defendant is not entitled to an opportunity to prove the facts alleged in his pleadings.

Let us take up these two questions in order.

I. In the Present Case, There Are Material Questions of Fact at Issue

The present case presents the following questions of fact at issue. (1) Did the defendant receive a notice from the proper authorities advising him that marketing quotas were available to the 1954 wheat crop? (2) Does the defendant consider it morally wrong, by reason of his religious training and belief, to limit the production of his farm, so that his farm produces any lesser amount of food than it can? And, (3) Has there been a failure of the Agriculture Adjustment Act of 1938 to achieve the objectives set forth in the Act since its enactment to the present time, so that its enforcement bears no reasonable relationship to the objectives sought by it, and that its continued enforcement is unlawful in that it deprives the defendant of property without due process of law.

The Questions of Fact at Issue Are Material

1. The issues disputed in paragraph 4 of both the Complaint and Answer are material. The question of fact is, did the defendant receive notice that 1954 was a quota year? The defendant avers that he did not receive such notice. It may be that the defendant did receive such

notice. If the defendant did receive such notice, it is not unreasonable for the plaintiff to be called upon to prove such fact.

This fact is material. If the year is a quota year, the defendant is subject to a penalty; if the year is not a quota year, the defendant is not subject to a penalty. If the defendant did not receive notice that the year 1954 was—or might be—a quota year, the defendant had no reason to believe that he would be penalized for planting more than his allotment of wheat—only that if he did plant more than his allotment, that he could not get price support on it, or a crop loan upon it.

While in many situations, it is reasonable to expect the individual to depend upon publication of proclamations in the Federal Register to ascertain whether the current crop year is a quota year or not, is the farmer to be expected to farm with a plow in one hand and a copy of the Federal Register in the other? Consequently, if the defendant did not receive actual notice by mail or other form reasonably calculated to give the defendant actual notice from the Department of Agriculture, the quota regulations as to the defendant are invalid, inasmuch as its enforcement in such circumstances would be a deprivation of property without due process of law.

Furthermore, the defendant must receive such notice under the provisions of Section 728.460 of the regulations published in 18 F. R. 6711, 6713.

Furthermore, the form of notice shown in Exhibit A of the Answer does not meet the constitutional requirements of the Fifth Amendment as to due process or the requirements of the regulation last quoted. Such notice tells

the defendant what his quota is—*if there is a quota*. The defendant, however, is entitled at some time before the normal time for the planting of his winter wheat crop to know *whether or not* there is a quota upon the wheat crop for the ensuing year.

2. The facts raised by paragraph 10 and 11 of the defendant's Answer are material. These relate to the defendant's religious beliefs. The decided cases in respect to the First Amendment are uncertain as to whether or not a defendant has a right to avoid the application of regulations of commerce upon him on the ground that they offend his religious beliefs. There are few cases on the First Amendment. However, in *Board of Education v. Barnette*, 319 U.S. 624, 63 S. Ct. 1178, 87 L. Ed. 1628, the Supreme Court held that it was a violation of the First Amendment to compel the pledge of allegiance to the flag of the United States. Refusal to serve as a juror did render a person who had conscientious objections to it liable for contempt of court. *U. S. v. Hillyard*, 52 F. Supp., 612. Nor may the government deprive a person of property because it disapproves of his religious beliefs. *Jinsha v. McGrath*, 90 F. Supp. 892.

While an adequate review of all the recent cases dealing with the effect of religious belief upon the constitutionality propriety of law enforcement would involve an extended review not appropriate here, we nevertheless believe that these few cases show that there is substance to the contention that religious convictions render inappropriate and unconstitutional provisions of law which would be proper in respect to persons without such convictions, and that your Honorable Court would be in a much better position to decide these questions, if it were to hear testi-

mony upon the nature of the defendant's religious convictions in respect to the planting of his farm.

3. The question of fact at issue in paragraph 13 (a) of the Answer is material. This allegation involves the question as to whether or not the wheat quota provisions are reasonably calculated to achieve the objectives set forth in the Agricultural Adjustment Act. If such provisions do not reasonably tend to accomplish the objectives set forth in the Act, then its enforcement upon the defendant by imposition of penalties constitutes a deprivation of property without due process of law.

In order to ascertain whether or not the wheat quota provisions of the Agricultural Adjustment Act in the operation over almost twenty years have accomplished their objectives, expert testimony is required. This is not a matter the Court can guess at. Nor is it a matter of which the Court can have judicial knowledge. Nor is it a matter which the Court can say is immaterial. Testimony must be heard. This has been the practice since Louis Brandeis, then an attorney, presented facts in *Muller v. Oregon*, 208 U.S. 412, 28 S. Ct. 324, 52 L. Ed. 551.

It is well settled that the constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the Court that those facts have ceased to exist. *Chastleton Corp. v. Sinclair*, 264 U. S. 543, 68 L. Ed. 841, 44 S. Ct. 405. Even if the Courts had previously held that the wheat quota provisions of the Agricultural Adjustment Act are reasonably calculated at a certain time in the past to achieve the objectives set forth in the Act (and we know of no case which has presented *this* issue to the Courts), this Court would be bound

upon an averment that the Act is not *now* calculated in its operations to achieve the objectives set forth in the Act, to hear evidence to the effect of its present operation, as they relate to due process.

II. Where There Are Material Questions of Fact at Issue, Particularly Relating to Public Issues of Importance and Constitutionality, the Court May Not Grant a Motion for Summary Judgment, Under Rule 56 of the Federal Rules of Civil Procedure

The commentators on the Federal Rules are quite definite that in a case raising constitutional issues, the case should not be disposed of on a Motion for Summary Judgment, but evidence relating to such issues should be heard. Barron and Holtzhoff state (section 1247):

> "Many of the decisions relating to motions for summary judgment involve simply the determination whether there is any issue of fact to be tried or whether the moving party is entitled to judgment as a matter of law. Such cases are not of value as precedents except in cases involving substantially the same fact situations. However, they serve to illustrate the usefulness of the summary judgment procedure, and futility of invoking it if there are real issues requiring trial, and the factors to be considered in determining whether the fact issues are sham or genuine.
>
> Motions for summary judgment have been granted or denied in a wide variety of cases, involving, for example, * * * constitutional rights * * *."

In respect to the issue of constitutional rights, Barron and Holtzhoff then cite *Farrell v. District of Columbia A. A. U.*, 153 F. 2d 647, *Pacific American Fisheries v. Mul-*

lawy, 191 F. 2d 137, and *Arkansas v. Cent. Sur. and Ins. Co., etc.*, 102 F. Supp. 444, which held that summary judgment could not be granted because material questions of facts were in issue in regard to constitutional questions.

Moore on Federal Practice is even more decisive. He states (section 56.17 (10)):

> "Constitutional and other questions of a large public import *should not be decided on an inadequate factual basis*. Hence, where the record is inadequate for the constitutional question presented or there are genuine factual issues, a motion for summary judgment should be denied. On the other hand summary judgment may be rendered where the constitutional issue is no longer an open one in light of previous decisions, or where the record is adequate for the constitutional question presented and there is no genuine issue of material fact." (Emphasis added)

Moore distinguishes constitutional cases in his commentary on Federal Practice from that of "important public issues"; the principles, however, are the same. As Moore says (section 56.16):

> "As previously suggested, *district courts should not, however, allow the summary judgment procedure to be used in such a manner that almost as much expense and effort is incurred in demonstrating that summary judgment should be denied and that the case should go to trial as the expense and effort involved in the actual trial.*" (Emphasis added)

And in this regard, he cites the examples of three Supreme Court cases in which the Court held that judgment could not be given upon a Motion for Summary Judgment, viz.,

Arenas v. United States, 322 U.S. 419, 64 S. Ct. 1090, 88 L. Ed. 1363, *Eccles v. People Bank*, 333 U.S. 426, 68 S. Ct. 641, 92 L. Ed. 784, and *Kennedy v. Silas Mason Co.*, 334 U.S. 249, 68 S. Ct. 1031, 92 L. Ed. 1347. It is important to note in these cases the strong language of the Supreme Court in disposing of cases on summary judgment where material questions of fact remained.

Moore concludes, after reviewing these cases:

"The golden doctrine that runs through and harmonizes the decisions is that the basic principles governing the summary judgment procedure be accommodated in a common sense manner to the realities of the litigation at hand." (Section 56.16, page 2170)

III. Evidence Must Be Admitted in Respect to Facts Material and Relevant to the Determination of Constitutional Issues

We think it is now well settled doctrine that evidence must be admitted in respect to facts material and relevant to the determination of constitutional issues. The recent cases before the Supreme Court of the United States involving segregation and civil rights make it increasingly clear that cases involving constitutional issues cannot be decided without a factual basis.

This was not always so well settled. As late as 1940, the great authority on evidence, John Henry Wigmore, wrote in the third edition of his treatise on this question as follows (Section 255(d)):

"(d) Where a legislative act is argued to be unconstitutional, and this is to depend upon the unreasonableness, or lack of possible reasonableness, of the law in its purpose or operation, and thus the ex-

ternal facts furnishing the possible legislative motive or the possible actual effect must be considered, this incidental question of fact is not for the jury, but for the Court. Hence, no testimony, of experts or others, would be admitted for the jury.

"But by what theory or method shall the Court receive information of the alleged facts? This is an interesting inquiry, hitherto not deliberately faced by the Courts. The principle of judicial notice has been loosely invoked."

This same comment appearing in the 1923 edition of Wigmore provoked a note in the Columbia Law Review, 30 Col. L.R. 360, and law review discussions on this problem have also appeared in 49 Harv. L.R. 631, and 38 Harv. L.R. 6, the last article by Henry Wolf Bikle of the University of Pennsylvania Law School. These law review articles appear to come to no conclusions about this problem, but they provide a good and provocative review of the decided cases involving the problem.

The former uncertainty and hesitancy of the law on this problem is further illustrated by the comment appearing in Corpus Juris Secundum, on Constitutional Law, section 97, page 232, et seq. (1939), which says:

"Generally, evidence aliunde is not admissible on the question as to whether the legislature has complied with constitutional limitations, and although the court will not necessarily confine itself to facts stated in the complaint and admitted by demurrer, but will act in the light of all matters of which it may take judicial notice, including all of the ultimate facts shown in reports if investigations of the legislature

upon which the enactment is presumably based, it must confine itself to consideration of matters so notice and those matters which appear on the face of the law. *It has been held, however, that the invalidity of legislative action may be shown by facts established by evidence, and that where the determination whether a statute is unreasonable, arbitrary, or not related to the ends proposed turns on factual considerations, the court may consider such facts and hear evidence with respect thereto. So where the validity of the statute is based on the existence of a certain set of facts, and the statute is challenged as applied to new circumstances, the court must admit evidence to sustain the challenge.* (Emphasis added)

Treatment of the Problem in Supreme Court Cases

While the problem of admitting evidence in respect to facts material and relevant to the determination of constitutional issues is touched upon in many Supreme Court cases, it has been dealt with directly in only a few. The three cases which, in retrospect stand out for their treatment of this problem are: *Chastleton Corp. v. Sinclair*, 264 U.S. 543, 44 S. Ct. 405, 68 L. Ed. 841, *Borden's Farm Products Co. v. Baldwin*, 293 U.S. 194, 55 S. Ct. 187, 79 L. Ed. 281, and *United States v. Carolene Products Co.*, 304 U.S. 144, 58 S. Ct. 779, 82 L. Ed. 1234. A very helpful annotation appears with the later case in 82 L. Ed. 1244 on this problem.

United States v. Carolene Products Co. is the most important of these cases. Mr. Justice Stone, delivering the opinion of the Court, says:

"Where the existence of a rational basis for legislation whose constitutionality is attacked depends

upon facts beyond the sphere of judicial notice, such facts may properly be made the subject of judicial inquiry. * * *, and the constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist. * * * Similarly, we recognize that the constitutionality of a statute, valid on its face, may be assailed by proof of facts tending to show that the statute as applied to a particular article is without support in reason because the article, although within the prohibited class, is so different from others of the class as to be without the reason of the prohibition, * * * though the effect of such proof depends on the relevant circumstances of each case, for example the administrative difficulty of excluding the article from the regulated class." (304 U. S. 153, 154)

The opinion of Mr. Justice Stone goes on then to discuss other important aspects of this question related to judicial notice and presumptions of constitutionality, which we are not quoting, because we think the part we have quoted is the heart of the opinion, nevertheless, we mention our brevity lest our adversary implies that we are intentionally omitting a further quotation from this opinion.

Other Supreme Court cases discussing this problem are: *Weaver v. Palmer Bros. Co.*, 270 U. S. 402, 46 S. Ct. 320, L. Ed. (1925), where Mr. Justice Butler, in speaking for the Court said:

"The question for decision is whether the provision purporting absolutely to forbid the use of shoddy in comfortables violates the due process clause or the equal protection clause. The answer depends on

the facts of the case. Legislative determinations expressed or implied are entitled to great weight; but it is *always open* to interested parties to show that the Legislature has transgressed the limits of its power. * * * Invalidity may be shown by things which will be judicially noticed, * * * or * * * *established by evidence*. The burden is on the attacking party to establish the invalidity." (279 U. S. 410, emphasis added.)

Nashville C. & St. L. R. Co. v. Walters, 294 U. S. 405, S. Ct., 79 L. Ed. 949, in particular the discussion on 294 U. S. 415; *Pacific States Co. v. White*, 296 U. S. 176, S. Ct., L. Ed., in particular the discussion on 296 U. S. 184, 185, especially since this involves, as the present case, a question of pleading; *Snowden v. Hughes*, 321 U. S. 1, 64 S. Ct. 397, L. Ed., in which the Court said:

"The unlawful administration by state officers of a state statute fair on its face, resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection unless there is shown to be present in it an element of intentional or purposeful discrimination. This may appear on the face of the action taken with respect to a particular class or person, * * * *or it may be shown by extrinsic evidence* showing a discriminatory design to favor one individual or class over another not to be inferred from the action itself. Yick Wo. v. Hopkins, 118 U. S. 356, 373, 374, 6 S. Ct. 1064, 1072, 1073, 30 L. Ed. 220." (321 U. S. 8, emphasis added.)

The importance of the facts in the determination of constitutional questions is well set forth in the concurring opinion of Mr. Justice Frankfurter in *Kovacs v. Cooper*,

336 U. S. 77, S. Ct., L. Ed., with his characteristic scholarship, showing that even in civil liberties, the facts rather than, as he puts it, "mechanical jurisprudence through the use of oversimplified formulas", (336 U. S. 96), must be considered. A study of Mr. Justice Frankfurter's comments is commended to the courts. In *Schneider v. State*, 308 U. S. 147, S. Ct., L. Ed., cited by Mr. Justice Frankfurter in this last case, the Court said:

> "In every case therefore, where legislative abridgment of the right (freedom of speech and of the press) is asserted, ***the courts should be astute to examine the effect of the challenged legislation.***" (308 U. S. 161, emphasis added.)

Treatment of the Problem in the Lower Federal Courts

The lower federal courts have also recognized the importance of receiving evidence in regard to facts material and relevant to the determination of constitutional questions. In *Paramount Pictures v. Langer*, 22 F. Supp. 890, 897, the Court said:

> "The two questions we are called upon to answer are:
>
> "1. Does the policy declared by the Act bear a reasonable relation to a proper public purpose, or is it palpably in excess of legislative power?
>
> "2. Are the means provided for the enforcement of the policy declared by the Act arbitrary and unreasonable?
>
> "In order to answer these questions, it is necessary to determine what the controlling facts are. *These facts are to be ascertained from the evidence*, from what is within the range of common knowledge, and from what is otherwise plainly subject to judicial

notice. Lindsley v. Natural Carbonic Gas. Co., 220 U. S. 61, 79, 31 S. Ct. 337, 55 L. Ed. 369, Ann. Cas. 1912C, 160." (Emphasis added.)

In *Bouchert v. City of Ranger*, 42 F. Supp. 577, in which the Court was determining whether the sect of Jehovah's Witnesses constituted a religion, the Court said, (p. 580):

> "In the disposition of this case I must look to the facts alleged and established, not to mere opinions of the pleader."

The Court placed particular reliance in the case upon *Schneider v. State*, supra, which we have recently mentioned. In *Moss v. Hawaiian Dredging Co.*, 187 F. 2d. 442, the Court said, (page 446):

> "It is true that recitals in legislation are not always conclusive. In a proper case the courts can examine into the facts to see whether Congress has transgressed the limits of its powers."

In *Law v. City of Baltimore*, 78 F. Supp. 346, the Court said, (page 351):

> "But it is equally well settled doctrine that when a federal court is called upon to apply personal constitutional rights it must determine the facts for itself on the evidence presented."

Treatment of the Problem by the State Courts.

The state courts have similarly recognized the importance of receiving evidence in regard to facts material and relevant to the determination of constitutional questions. In *Pennsylvania R. Co. v. Driscoll*, Pa. , 198 A. 130, 134 the court said:

> "When the result is reached, if it is found the statutory protection is of such slight consequence, or

> is so incidental, as to cause the provisions of the act to be wholly impractical, and not in promotion of the safety it seems to strive for, then its operation would be unreasonable and arbitrary. This situation could only be determined by evidence."

The same court reached a similar position in *Harrisburg Dairies v. Eisaman*, 328 Pa. 195, 195 A. 337, and in the second case of the same name at Pa. , 11 A. 2d 875, 877. The importance of facts in determination of constitutional questions was recognized in *Waller v. Commonwealth*, Va. , 16 S.E. 2d 808, *Ritholz v. Johnson*, 244 Wisc. 494, 12 N.W. 2d 738 (1944), *East New York Sav. Bank v. Hahn*, 59 N.E. 2d 625, 293 N. Y. 622.

In conclusion, therefore, we believe that plaintiff's motion for summary judgment should be denied. There are questions of fact at issue under the pleadings in this case and the questions of fact at issue are material. The existing cases where material questions of fact are at issue indicate that in such circumstances no motion for summary judgment may be granted. This is especially so when public issues of importance or constitutionality are involved, as in the present case.

And finally, recent developments in the law indicate that constitutional questions cannot be denied without examining the application of principles of constitutional law to the particular facts involved and that evidence must be taken in order to clarify the application of these principles to the facts.

Respectfully submitted,

ANDREW WILSON GREEN

Attorney for defendant

Defendant's Memorandum of Law

Certificate of Service

I hereby certify that I have made service upon the Plaintiff of the foregoing Memorandum of Law in the Nature of an Answer and Argument to the Plaintiff's Motion for Summary Judgment, by sending a copy thereof by first class mail prepaid unto:

J. Julius Levy, Esq.
United States Attorney
Middle District of Pennsylvania
Scranton, Pa.

ANDREW WILSON GREEN

May 29, 1956

VI.

MEMORANDUM IN SUPPORT OF GOVERNMENT'S MOTION FOR SUMMARY JUDGMENT

FACTS

This is a proceeding in which the United States of America filed a Complaint under the provisions of the Agricultural Adjustment Act of 1938, as amended and supplemented (7 U.S.C. 1281-1393; Act of January 30, 1954, 68 Stat. 4; and Act of August 2, 1954, 68 Stat. 897), to collect penalties provided in the Act. The defendant filed an Answer in which all material facts were admitted or in effect, amounted to an admission. Under New Matter, the defendant raised certain legal defenses. The United States of America then filed a Motion for Summary Judgment supported by affidavits. The Motion came on for hearing before the Court on June 4th, 1956, in Williamsport, Pennsylvania.

LAW AND ARGUMENT

Rule 56(c) of the Federal Rules of Civil Procedure provides that judgment,

> "... shall be rendered forthwith if the pleadings, depositions and admissions on file, together with the affidavits, if any, show that there is *no genuine issue as to any material fact*, and the moving party is entitled to judgment as a matter of law." (emphasis supplied)

Plaintiff's Memorandum of Law

The Motion for Summary Judgment is a proceeding before trial in which the Court cannot try issues of fact; it can only determine whether or not there are issues to be tried. The Court can only determine whether or not there exist facts in dispute between the parties. If there are facts in dispute the Court can determine whether or not they are "material" and then whether or not there is a "genuine issue" as to the material fact or facts. A question of fact which is immaterial does not preclude summary judgment. Although the party seeking the judgment has the burden to show that no genuine issue of a material fact or facts exists, there is also an obligation on the opposing party to do more than rely on his pleadings and general denials. *Chandler Laboratories v. Smith*, D. C. Pa. (1950) 88 F. Supp. 583; *McClellan v. Montana-Dakota Utilities Co.*, 104 F. Supp. 46, affirmed 204 F. 2d 166.

It has also been held that briefs of counsel are not part of the record on which the motion is determined. *Allen v. Radio Corp. of America*, D. C. Del. 1942, 47 F. Supp. 244.

An examination of the Complaint and Answer thereto will indicate that all material facts have been admitted. In paragraph 4 of the Answer defendant admits receipt of the 1954 notice of wheat acreage allotment, but questions whether the original contained certain verbage found in a copy sent to him at his request after he "inadvertently" destroyed his original copy. This is not a denial; nevertheless, in the affidavit of E. Eloise Light the government offered proof that the original notice of wheat allotment contained the same verbage as that originally sent to defendant. In fact it was the only such type form in use for the 1954 allotment year. At the hearing on this Motion,

the defendant offered nothing to dispute the government's affidavit.

In his Memorandum opposing the government's Motion, defendant's counsel now states that he did not receive the notice alleged in Paragraph IV of the Complaint. This is in direct conflict with defendant's Answer on this fact. An examination of paragraph IV will indicate that it does not speak of a notice that 1954 would be a quota year, but merely that an allotment had been established and notice thereof had been sent pursuant to the statute. The defendant's argument (Memorandum page 3) following this is in error. The reference to Section 728.460 of the Regulations in 18 F.R. 6711, 6713 is correct for notice of the farm marketing quota, but has nothing to do with notice that quotas will be in effect. That notice of the farm marketing quota was received is contained in the admission of Paragraph 5 of the Answer.

In his answer to Paragraph V of the Complaint the defendant raises the immaterial issue that the notice of determination of facts dated June 2, 1954 was made before the harvesting of the wheat in question. It is submitted that the Complaint cites the authority and circumstances permitting such a determination to be made. Also cited in the Complaint is the authority granting the farmer a right to apply for an adjudgment in the event his actual crop is less than the determination. The notice itself advises the farmer of his rights to apply for adjustment. (See Exhibit "B" attached to affidavit of E. Eloise Light, filed in support of Motion for Summary Judgment.) Of what significance the fact that the determination notice was received before harvest is not known, but regardless,

the legal validity of the determination cannot be raised in this proceeding (7 U.S.C. 1367).

Although not raised in his Answer, the defendant claims that he did not receive notice that 1954 was a quota year. Not having raised the question properly it should not be before the Court. Nevertheless, the issue is not without answer. It is true that defendant did not personally receive written or formal notice that quotas will be applicable during the 1954-1955 marketing year. The law does not provide or require personal notice. The Secretary of Agriculture did proclaim on June 30th, 1953 that a national marketing quota would be in effect for the following marketing year (18 F.R. 3781, Reg. 728.402). On July 15, 1953, Notice of Referendum provided for in 7 U.S.C. 1336 was given, in which information as to time, registration, eligibility, and place of voting was stated (18 F.R. 4221). After the referendum, the Secretary of Agriculture proclaimed that 87.2% of the voting farmers were in favor of wheat marketing quotas for the year 1954-1955 (18 F.R. 5707). These proclamations of the Secretary are made public and receive public attention through postings, newspapers, radio and television.

In his Memorandum the defendant states that he must receive such notice under the provisions of 18 F.R. 6711, Reg. 728.460. If one reads just the caption of the regulation he might be led to so believe, but if one takes the time to read the section "en toto" it becomes obvious that it pertains to the quota established for the farm and not whether quotas will be in effect. That the notice provided for in Section 728.460 was received by the defendant is admitted in paragraph 5 of his Answer. There he refers to it as "notice of the determination of facts" although

it is captioned "Notice of 1954 Farm Marketing Quota and Farm Marketing Excess of Wheat". (See Exhibit "B" in affidavit of E. Eloise Light, supra).

Under "New Matter" the defendant raises certain questions of law, also erroneously referred to in his Memorandum of Law as questions of fact.

First, we have the defendant contending that the enforcement of the Act against him, in the manner sought in the Complaint, would be contrary to the First Amendment to the Constitution of the United States, which provides that "Congress shall make no law . . . prohibiting the free exercise (of religion) . . ." In support of such claim it is alleged (par 10) that defendant, by reason of his religious training and belief, considers it morally wrong and contrary to the teachings of the Holy Scriptures "to limit the production of his farm so that his farm produces any lesser amount of food than it can" subject to the knowledge and judgment of farming which God has been pleased to give to the defendant in respect to the farming of his farm.

Defendant's contention in this respect is without foundation as neither the Act nor the regulations issued thereunder by the Secretary of Agriculture contain any limitation on the amount of wheat which may be produced on a farm.

Specifically, the Act as it applies to defendant's 1954 crop of wheat provided for the determination of a wheat acreage allotment and a farm marketing quota for defendant's farm and for notice to defendant of such acreage allotment and marketing quota (7 U.S.C. 1362).

Marketing quotas are not applicable to farms on which the acreage planted to wheat is not in excess of 15 acres (7 U.S.C. 1340 (7)), and for farms on which the normal production of the acreage planted to wheat of the current crop is less than 200 bushels (7 U.S.C. 1335(d)). The normal production or the actual production, whichever is the smaller, of the excess acreage is designated the "farm marketing excess" (7 U.S.C. 1340 (1)). The "farm marketing excess" is required to be computed upon the normal production of the excess acreage but the producer may, upon application, obtain a downward adjustment of the farm marketing excess if the actual production of the excess acreage is less than the normal production (7 U.S.C. 1340(3)). In no event may the farm marketing excess for any crop of wheat for any farm be larger than the amount by which the actual production of such crop of wheat on the farm exceeds the normal production of the farm wheat acreage allotment, if the producer establishes such actual production to the satisfaction of the Secretary (7 U.S.C. 1340(12)). During any marketing year for which quotas are in effect, the producer is subject to a penalty on the farm marketing excess (7U.S.C. 1340(2)). However, the Secretary is required to issue regulations under which the farm marketing excess for the farm may be stored or delivered to him, and only upon failure to store or deliver the farm marketing excess is the producer required to pay the penalty thereon. The Act further provides that any wheat delivered to the Secretary "shall become the property of the United States and shall be disposed of by the Secretary for relief purposes in the United States or in foreign countries or in such other manner as he shall determine will divert it from the normal channels of trade and commerce" (7 U.S.C. 1340(3)).

If the producer is dissatisfied with the farm marketing quota determined for his farm he may obtain an administrative (7 U.S.C. 1363) and judicial (7 U.S.C. 1368) review of his "Farm marketing quota". A request for the review of the farm marketing quota is required to be made within 15 days after mailing of notice, and "Unless application for review is made within such period, the original determination of the farm marketing quota shall be final" (7 U.S.C. 1363). In this connection, the Act further provides that "No court of the United States or of any State shall have jurisdiction to pass upon the legal validity of any such determination except in a proceeding under this Part" (7 U.S.C. 1367, supra).

From the foregoing provisions of the Act it will be noted that there is no limitation upon the amount of wheat which may be produced on any farm. Nor is the producer of the wheat required to pay a penalty on the farm marketing excess determined for his farm, except upon his failure to store or deliver to the Secretary such farm marketing excess. Therefore, the claim that the Act limits the amount of wheat which he may produce on his farm is not available to defendant. He may only argue that his production of wheat on acreage in excess of the allotment for his farm is less profitable. This he has not done.

Assuming, arguendo, that the Act operates as a limitation on the amount of wheat which defendant could produce on his farm, it is not violative of the first amendment as an infringement upon the free exercise of religion by defendant.

The scope and application of the first amendment involves two concepts: (1) freedom to believe, and (2) free-

dom to act. While the first is absolute, the second remains subject to regulation for the protection of society (*Cantwell v. Connecticut*, 310 U. S. 296, 303-304; *Reynolds v. United States*, 98 U. S. 145, 146; *Davis v. Beason*, 133 U. S. 333, 345).

To permit a man to excuse conduct in violation of law on the ground of religious belief "would be to make the professed doctrines of religious belief superior to the law of the land and, in effect, to permit every citizen to become a law unto himself" (*Reynolds v. United States*, 98 U. S. 145, 167). The Act herein was enacted by Congress to obviate or minimize recurring surpluses and shortages of wheat in interstate and foreign commerce and, inter alia, to prevent the abnormally low and abnormally high wheat prices which result from such surpluses and shortages, and to provide for the maintenance of adequate reserve supplies of wheat and to provide an adequate flow of wheat and its products in interstate and foreign commerce (7 U.S.C. 1952 ed. §1331). The Congress determined that the "conditions affecting the production and marketing of wheat are such that, without Federal assistance, farmers, individually or in cooperation, cannot effectively prevent the recurrence of such surpluses and shortages and the burdens on interstate and foreign commerce resulting therefrom, maintain normal supplies of wheat, or provide for the orderly marketing thereof in interstate and foreign commerce" (7 U.S.C. 1952 ed. §1331).

The provisions of the Act, as they relate to wheat marketing quotas, were fully considered by the Supreme Court in the case of *Wickard v. Filburn*, 317 U. S. 111, and upheld as a valid exercise of the power of Congress

to regulate commerce; also followed in *United States v. Blattner*, ED Pa. 127 F. Supp. 628, affirmed 223 F. 2d 468 (CA 3), and *United States v. Mumma* (CA 3), F. 2d . A quota system has been characterized as a "familiar device" in the regulation of commerce (*Secretary of Agriculture v. Central Roig Co.*, 338 U. S. 604, 606). Quotas for tobacco, quotas for wheat, and quotas for sugar have been held valid by the Supreme Court (*Mulford v. Smith*, 307 U. S. 38, 41-51; *Wickard v. Filburn*, 317 U. S. 111, 113-133; *Secretary of Agriculture v. Central Roig Co.*, 338 U. S. 604, 605-620). Also quotas for cotton, oranges, grapefruit, and walnuts have been held valid (*Troppy v. LaSara Farmers Gin Co.*, 113 F. 2d 350, 351-352; *Whitterburg v. United States*, 100 F. 2d 526, 521-523; *Wallace v. Hudson-Duncan & Co.*, 98 F. 2d 985, 989-994; *Edwards v. United States*, 91 F. 2d 767, 778-789). In addition to quotas with respect to agricultural products, the Courts have upheld the validity of quotas with respect to petroleum and railway cars (*Griswold v. The President of the United States*, 82 F. 2d 922, 923-926; *Assigned Car Cases*, 274 U. S. 564, 575; *Avent v. United States*, 266 U. S. 127, 129-131).

Directly in point herein is the case of *Mitchell v. Pilgrim Holiness Church Corporation*, 210 F. 2d 879, cert. den. 347 U. S. 1013, which also involved a statute based on the commerce clause of the Constitution. In that action the Secretary of Labor sought an injunction restraining a religious corporation from acts allegedly in violation of the Fair Labor Standards Act. In holding that the application of the Fair Labor Standards Act to those employees of the religious corporation who work at that part of the corporation's activities which constitutes interstate commerce

does not violate the constitutional provisions guaranteeing freedom of religion, the Court stated:

> "In the recent case of Poulos v. New Hampshire, 345 U. S. 395, 405, 73 S. Ct. 760, 97 L. Ed. 1105, the Supreme Court reiterated its adherence to the principle that the guarantees of the First Amendment of freedom of speech and of the exercise of religion are not violated by reasonable, nondiscriminatory regulation by governmental authority that preserves peace, order and tranquility.
>
> "It seems clear, in the instant case, that the Fair Labor Standards Act is such a reasonable, nondiscriminatory regulation by an Act of Congress, a regulation in the interests of society for the welfare of all workers, and that, therefore, the application of the provisions of the Act to the Pilgrim Holiness Church Corporation and to its employees who work in the production, printing, handling, addressing and distributing of the books, magazines, pamphlets, leaflets and other printed matter issued by the defendant and to all other employees of the defendant whose work is necessary to the production of such goods does not violate the Constitutional provisions guaranteeing the free exercise of religion."

The fundamental concept of liberty embodied in the fourteenth amendment embraces the liberties guaranteed by the first amendment (*Cantwell v. Connecticut*, 310 U. S. 96, 303). Without violating the constitutional guarantees the State, under the police power, may enact in order to promote the general welfare, public health, public safety and order, public morals, and to prevent fraud (16 C.J.S., Constitutional Law, Sec. 206b, p. 601). "Although the

present regulation is under the commerce power of the federal government, Wickard v. Filburn, supra, rather than under the police power, it has long been recognized that 'where a certain field of activity becomes subject to one of the enumerated federal powers, then the federal government may in that field exercise authority comparable to state police power'. Doherty v. U. S., 8 Cir., 94 F. 2d 495, certiorari denied 303 U. S. 658, 58 S. Ct. 763, 82 L. Ed. 1117. See also Hamilton v. Kentucky Distilleries & Warehouse Co., 251 U. S. 146, 40 S. Ct. 106, 64 L. Ed. 194." (*United States v. Shafer*, 132 F. Supp. 659, 665).

Secondly, we have the claim that Congress has no power to pass such an Act under the provisions of the commerce clause and any enforcement of the Act is violative of that portion of the Fifth Amendment which prohibits depriving one ". . . of life, liberty, or property, without due process of law."

As stated previously in this Memorandum, the Supreme Court of the United States has already upheld this Act as a valid exercise of the power of Congress to regulate commerce, and further, that its provisions are not violative of the Fifth Amendment. *Wicker v. Filburn*, supra, followed in *United States v. Blattner* and *United States v. Mumma*, supra.

Thirdly, the defendant's Memorandum of Law states that in order for the Court to determine whether or not the Act has accomplished its objective, "testimony must be heard." He also states that where the constitutionality is in issue, the Court may not grant a motion for summary judgment. In support of these contentions the defendant cites authority.

Initially, the Government reavers that the constitutional questions are settled. It also suggested that defendant had opportunity to submit economic data to the Secretary of Agriculture prior to the determination that wheat quotas would be in effect for the 1954-55 crop of wheat. See Notice issued April 21st, 1953, 18 F. R. 2417.

The Government does not dispute the authority cited by defendant, but states that it is cited out of context and inaccurately. The defendant in support of his allegation that "testimony must be heard", cited *Muller v. Oregon*, 208 U. S. 412. In that case testimony was not heard, but instead the Court permitted the filing of a brief for consideration. Again, in *Chastleton Corp. v. Sinclair*, 264 U. S. 543, the Court was faced with a case where a statute was dependent upon an "emergency" or "other certain state of facts" to uphold it. This is not present in the instant case.

In support of his contention that summary judgment may not be granted where constitutional issues exist, defendant cited many authorities. It is submitted that in his own memorandum the defendant cites Moore on Federal Practice, Section 56.17(10), wherein it is stated:

> "On the other hand summary judgment may be rendered where the constitutional issue is no longer an open one in light of previous decisions, or where the record is adequate for the constitutional question presented and there is no genuine issue of material fact."

In support of this view we have *Hawthorne v. United States*, 31 F. Supp. 827, affirmed in CA5, 1940, 115 F. 2d 805, involving the constitutionality of the cotton marketing

quota provisions of the Agricultural Adjustment Act, and *Nostrand Poultry Market v. United States* (E.D. N. Y.), 1945, 59 F. Supp. 245, involving the constitutionality of the Packers and Stockyards Act. In the Hawthorne case the defendant admitted most of the allegations in the complaint, but raised ten defenses, all attacking the constitutionality of the Act. The Court held that the Act had been carefully scrutinized by the Supreme Court, and had been upheld. The Court also said that if the farmer is not satisfied with the quota he has a right to appeal, and it was not done. The Court further stated that it was deeply sensible of the reluctance in free citizens to comply and be hampered by regulations, but the Constitution gives the power to Congress to control interstate commerce, and the Act has come out of that authority. It would not pass on questions unnecessary to the determination of the case.

Lastly, we have defendant's allegation that "evidence must be admitted in respect to facts material and relevant to the determination of constitutional issues." The Government admits that to determine any important issue it is necessary to know "facts". This is especially true when concerned with matters such as segregation and civil rights now being viewed in a new and different concept, but it is not necessary on matters tested, proved and sustained over and over again by the Courts as in the case of the Act now before the Court. Notwithstanding this, the very authority cited by defendant states that the Court "*may*" make the facts the subject of judicial inquiry, and not that the Court "*must*" make the inquiry as the defendant would want us to believe.

In support of his position defendant cites, "The most important of these cases, "*United States v. Carolene*

Products Co., 304 U. S. 144. This very case suggests that the Court *may* take judicial notice of facts, and if beyond the sphere of judicial notice the Court "*may*" make those facts the subject of judicial inquiry. From this we can conclude that whether or not evidence will be admitted is wholly discretionary with the Court.

In the last mentioned case it is suggested that the judicial inquiry may be made if the facts are beyond the sphere of judicial notice. This Court can certainly take judicial notice of the economic conditions in this country. In 31 C.J.S. 643 it is stated that the Court will take judicial notice of general economic conditions, including competition in particular industries; financial reverses suffered by many families, steps taken to provide relief to needy, and *conditions affecting agriculture.* In 31 *C.J.S.* 557 we find that Courts have taken judicial notice of particular matters relating to wheat raising. The Government believes that this Court can take judicial notice of the fact that economic conditions with respect to the wheat crop in this country and in the world has not changed materially from the conditions and purposes stated in the Legislative Findings of Congress stated in Section 1331 of the Act, 7 U.S.C.A.

Also cited by the defendant in support of his contention that evidence must be admitted is the case of *Snowden v. Hughes*, 321 U. S. 1, 64 S. Ct. 397. On page ten of his brief the defendant quotes and emphasizes that discrimination "*may be shown by extrinsic evidence,*" but a careful reading of the case will indicate that it has no relation to this case for a correct quotation from that case would state "or it *may only* be shown by extrinsic evidence" (emphasis supplied). The Government believes

that the quotation read as reported would mean that the Court *may* go into such evidence if it does not appear otherwise or cannot be determined otherwise. Under such circumstances, extrinsic evidence would be the *only* way to bring facts to the Court's attention. This case does not warrant nor require such inquiry.

In conclusion, the Government states that there is no issue as to any material fact, and that upon the law alone, summary judgment should be granted for the plaintiff, the United States of America.

Respectfully submitted,

EDWIN M. KOSIC

Assistant United States Attorney

Opinion

VII.

OPINION

The United States of America instituted this action against Henry Kissinger to recover civil penalties under the Agricultural Adjustment Act of 1938, as amended, 7 U.S.C. §1281 et seq., alleging that defendant failed to store or deliver to the Secretary any part of the farm marketing excess of wheat in accordance with the requirements of the Act and the regulations promulgated thereunder. Plaintiff has filed motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure.

The Secretary of Agriculture, pursuant to the provisions of the Agricultural Adjustment Act, on June 30, 1953, by proclamation duly filed (18 F.R. 3780-1) declared a National Marketing quota in effect with respect to the marketing of wheat during the 1954-1955 marketing year. Notice of a referendum of farmers who would be subject to the quota, as required by 7 U.S.C. §1336, was duly promulgated, 18 F.R. 4221. On September 22, 1953, a proclamation was duly issued (18 F.R. 5707) announcing the results of the Wheat Marketing Quota Referendum for the marketing year 1954-1955, which proclamation stated "Therefore, wheat marketing quotas will be in effect for the 1954-55 marketing year."

The defendant contends that he did not receive a personal notification of the fact that wheat marketing quotas were in effect for the 1954-1955 marketing year. There is

no such requirement in the Act. This matter was fully covered by the administrative action properly filed and published in the Federal Register as indicated above. The requirement of 7 U.S.C. §1362 is that "Notice of the farm marketing quota of his farm shall be mailed to the farmer." He does not deny that he received the "Notification Of 1954 Wheat Acreage Allotment" establishing a wheat allotment of 16 acres for 1954 for his farm. His answer in this respect, however, alleges "It is admitted that the defendant received notification of 1954 wheat acreage allotment in a form similar to that set forth in Exhibit A, attached hereto and made a part hereof. However, the original notification was inadvertently destroyed by the defendant, and the defendant requested another copy of this notification from the Dauphin County Production and Marketing Administration Committee, who sent him a notification, a copy of which is attached hereto as Exhibit A. However, the defendant believes that the second notification sent to him differs from the first in that the first did not include the words 'and for farm marketing quotas if marketing quotas are applicable for the 1954 wheat crop', and also 'if marketing quotas are applicable to the 1954 crop of wheat', as underlined on the said Exhibit A, or any other words pertaining to quotas. Except as hereinabove stated, Paragraph 4 is admitted."

An affidavit in support of the motion for summary judgment attaches a copy of the Form GR-308-WHEAT (1954) (4-28-53), which was sent to defendant and avers "That the wording contained in said notice is the same as the wording on all other such notices used for the notification of 1954 Wheat Acreage Allotments as printed by the United States Government Printing Office coded 1953-

252926." and "That all 1954 Wheat Acreage Allotment notices marked, 'copy', 'second run', 'duplicate', 'correction', etc. which were mailed from this office were from the same government printing order (1953-252926)." This is not denied.

This lack of memory of defendant does not rise to the dignity of creating a genuine issue of fact.[1] Neither does it raise a material issue of fact since he must be charged with knowledge of the original declaration of the Secretary of Agriculture and of the result of the referendum vote by the farmers affected thereby, in which referendum he either did or should have participated. Upon his failure to apply for review of the determination of his farm marketing quota, as required by the Act, it became final, 7 U.S.C. §1363. That he subsequently received on or about June 2, 1954, the "Notice Of 1954 Farm Marketing Quota And Farm Marketing Excess Of Wheat" for his farm, and that he made no application for downward adjustment in the marketing excess as provided in the Act, is not in dispute.

There is therefore no genuine or material issue of fact. On the facts pleaded plaintiff is clearly entitled to judgment. Defendant's main reliance appears to be on the question of the constitutionality of the Act. This precise issue was before the Court of Appeals of this Circuit in United States v. Mumma, 3 Cir., 237 F. 2d 795, Cert. Den. Feb. 26, 1957, not yet reported, and that court there said "Appellant's sole contention is that the Act is uncon-

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[1] Chandler Laboratories v. Smith, D.C. E.D. Pa., 88 F. Supp. 583; McClellan v. Montana-Dakota Utilities Co., D.C. Minn., 104 F. Supp. 46, Affirmed 8 Cir., 204 F. 2d 166.

stitutional. In line with this, she argues that Wickard v. Filburn, 1942, 317 U.S. 111, 63 S. Ct. 82, 87 L. Ed. 122, which upheld the constitutionality of the Act and the cases which followed that decision, including our own Blattner v. United States, 3 Cir., 1955, 223 F. 2d 468, were all decided erroneously. We disagree with that view."

The motion for summary judgment will therefore be granted. Let Order be submitted accordingly.

(s) FREDERICK V. FOLLMER

United States District Judge

March 1, 1957.

VIII.
ORDER OF COURT

NOW, this 22nd day of March, 1957, the above matter having come before the Court on Motion of the Plaintiff for Summary Judgment under Rule 56 of the F.R.C.P., and the Court by Opinion dated March 1, 1957, having granted the Motion for Summary Judgment in favor of the Plaintiff, and against the Defendant, it is hereby,

ORDERED, ADJUDGED AND DECREED, that Summary Judgment be entered in favor of the United States of America, and against the defendant, Henry Kissinger, in the sum of Forty Seven Dollars and Four Cents ($47.04), plus the costs of suit.

(s) FREDERICK V. FOLLMER
United States District Judge

Excerpt from New York Times

IX.

ADDENDA—NEWSPAPER ARTICLES

(1) EXCERPT FROM THE NEW YORK TIMES

THE NEW YORK TIMES
Sunday, April 14, 1957

WHEAT SURPLUS IS CUT, PAINFULLY

Snowfalls Relieved Drought and Offset the Diversion of Land Into Soil Bank

Exports Up—This Year,

But Crop Outlook Improves in Europe—Consumption Is Declining in U. S.

By J. H. Carmical

The Government is meeting with some success in reducing the wheat surplus at long last.

Largely reflecting increased exports, a drop of 75,000,000 to 100,000,000 bushels in the carry-over is expected for the crop year ending June 30. This would be only [illegible]

Excerpt from New York Times

to 8 per cent of the record carry-over of 1,030,000,000 bushels on last July 1, so that the prospective decline is considered more a psychological victory than a solution of the surplus problem.

With this year's crop now expected to be about 850,000,000 bushels, which is some 200,000,000 to 250,000,000 bushels more than domestic consumption, the Government cannot afford to ease up in its drive to dispose of wheat abroad and curb production at home.

The area seeded to wheat last fall was the smallest since 1913. Reflecting the large acreage that was placed in the soil bank, only 36,779,000 acres were sown, compared with 44,503,000 a year earlier, a decline of 7,724,000 acres.

However, the Department of Agriculture last week forecast the yield of winter wheat at 669,080,000 bushels, only about 66,000,000 bushels less than the 734,995,000 bushels last year.

Snows Relieve Drought

Although the crop got off to a poor start last fall because of drought, recent snows and rains have effected a great improvement, and the consensus in the grain trade is that the Government's estimate may prove to be on the low side.

Most of the farmers put only their poorest acres into the soil bank. Much of the country's most fertile land is in wheat and the chances are that, if favorable weather prevails, a winter wheat crop approximating that of 1956 will be harvested this year.

Excerpt from New York Times

Largely because of the drought, nearly 20 per cent of last year's crop was not harvested as grain. This year, the Government estimates that 17.1 per cent of the acreage will not be harvested, but this guess may prove high. The ten-year (1946-55) average for abandonment was only 14.8 per cent, and the feeling in the trade is that the percentage this year may not be any greater.

While it is too early to forecast with any degree of accuracy the yield from the spring wheat crop, since most of it has not yet been sown, the trade is not looking for a yield below 175,000,000 bushels. Last year, the spring crop amounted to 253,000,000 bushels.

With the most fertile land likely to be planted, the acreage reduction here again may not result in a corresponding reduction in the yield.

Exports Key Question

It therefore looks as if this year's total wheat yield will be no more than 150,000,000 bushels below the 1956 crop, despite the fact that about 12,800,000 acres of winter and spring wheat land was in the soil bank at the end of March. This is roughly 25 per cent of the 1956 harvested area of 49,800,000 acres.

If exports in the coming season are maintained at the level of this season, this year's crop should be marketed with little difficulty and the surplus should be cut sharply. However, with prospects of larger crops abroad, particularly in Europe and the Soviet Union, competition for markets may be considerably keener than they have been.

Exports this season are expected to amount to 450,000,000 bushels, or more than double the 221,500,000 of

the previous season. A key factor was the short crop in Europe caused largely by the harsh winter of 1956. This year, Europe has experienced the mildest winter in some fifty years.

The unsettled political situation abroad, including the Suez crisis, also has stimulated the export of wheat from this country. The closing of the Suez Canal reduced the movement of Australian wheat to Europe. In addition, Egypt, which must buy 40 per cent of its supplies abroad, has been getting them from Russia, which has had to replace them by purchases elsewhere.

United States wheat this season has found a world-wide market, with thirty-two of the forty-two importing members of the International Wheat agreement coming here for supplies. In the first nine months of this season, export shipments amounted to 385,000,000 bushels.

Subsidy Moves Wheat

Another factor has been the wheat export policy that went into effect last September. Under that program, the markets were returned largely to commercial channels, with the Government paying an export subsidy in kind from its wheat stocks. Traders have been active in seeking business and have been able to cater to the particular needs of foreign consumers.

With the cereal being moved directly from the producers to consumers by the private trade, the amount going into the Government loan has been less than previously. And with subsidy payments in kind amounting to roughly one-third of the exports, the Government also has been able to reduce its holdings.

Excerpt from New York Times

Although exports have been moving ahead at a great pace, domestic consumption has declined a bit despite the steady gain in population. This stems largely from the facts that each year fewer housewives bake their own bread and that smaller quantities of wheat are being used for livestock feed because of the abundance of cheaper cereals. Also, with nearly one-fourth fewer acres seeded, the amount used for seed is less than normal.

Drop in Use Is Indicated

For these reasons, domestic consumption of wheat this season may not be more than 600,000,000 to 625,000,000 bushels, compared with 675,000,000 to 700,000,000 bushels normally.

No increase in domestic consumption can be expected this year. The Department of Agriculture reports that farmers intend to plant a total of 7,000,000 acres more in oats, sorghums and soybeans this year than in 1956. This indicates that less wheat will be used this season for livestock feed.

A factor in the decline in human consumption of wheat is the rise in wages and the trend toward more expensive foods.

(2) EXCERPT FROM SUNDAY PATRIOT-NEWS

SUNDAY PATRIOT-NEWS, HARRISBURG, PA.
April 21, 1957

POLITICAL TIME IS SHORT FOR GOP TO SOLVE FARM INCOME DROP, SURPLUS CLIMB

WASHINGTON, April 20 (AP)—Time is becoming a vital element in efforts of the Eisenhower administration to leave the farm situation in better shape than it found it in 1953.

Certainly, what the administration does between now and the elections in 1960 may have a lot to do with Republican chances of holding onto the White House that year.

Moving into its fifth year in office, the administration is faced by these three hard facts:

1. Farm prices are 13 per cent below the level prevailing when Eisenhower took office.

2. Farm surpluses are nearly three times as large as they were at that same time.

3. The government has spent more on agriculture during the first four years of the administration than in the preceding 20 years.

Big Job Ahead

As these facts clearly indicate, the administration has a big job getting agriculture back where it was four years ago.

Excerpt from Sunday Patriot-News

It is a recognition of this task—and the relative shortness of time remaining—that is leading Secretary of Agriculture Benson to say that present programs need drastic overhauling. Otherwise, he says, surpluses at the end of the administration may be as large as they are now.

The government now has $8,360,000,000 invested in farm surpluses. The investment four years ago was $2,912,000,000. This big increase was made in the face of broad use of crop production control programs and expenditure of upwards of $4 billion in subsidizing exports.

Truman Program

Of course, Benson says that programs of the Truman administration, which by law he was required to use through 1954, contributed heavily to the buildup of surpluses.

Two years of programs patterned largely after Benson's recommendations have cut the investment in surpluses about half a billion dollars. This is not fast enough, however. It would take an annual reduction of more than three times that amount—or about $1,816,000,000—to get the investment down to the pre-Eisenhower level by election time in 1960.

The secretary is counting some on the new soil bank program to help reduce surpluses. Under this program, the department is authorized to pay farmers up to $1,200,000,000 a year to retire land from production of surplus crops.

Farmers Shun It

But there is serious doubt among farm leaders that it will do the job. In the first place, many farmers are

Excerpt from Sunday Patriot-News

staying out of the program, preferring to take their chances on producing all that is possible under whatever federal limitations that may be in effect.

In the second place, reports show that poorest-producing land is being retired and that extra heavy use of fertilizers is being made on the remainder of the land in an attempt to keep production as close as possible to previous levels.

During the past three years, the administration has had the benefit of a much broader export subsidy program than it is likely to have during the next three. In 1954 Congress authorized the department to sell $3 billion's worth of farm surpluses to friendly countries not only at cutrate prices but for currencies of those countries.

Billion Needed

This $3 billion authorization has been used up and the President has requested an addition of only $1 billion for the period ahead.

But the things that worry Benson the most are provisions of present crop control and price support laws. Under these laws, he is required to raise price support rates and to liberalize planting allotments as surpluses decline.

Benson says that higher supports and larger planting allotments would encourage unneeded increases in production which could only rebuild new surplus stocks.

Wants Authority

He believes his department should have authority to fix price supports and planting allotments at whatever

Excerpt from Sunday Patriot-News

levels it believes would stabilize production at levels required by markets.

In other words, it would be possible, the secretary says, for the price support and production control program—as they now operate—to boost production and largely offset efforts to dispose of surpluses.

But Benson must pattern his programs after the laws as they now stand unless Congress changes them. He recognizes, however, that the lawmakers are in no mood this year to make changes in farm legislation. They have shown that in rejecting proposals for a new corn program as well as displaying reluctance to take up other farm proposals.

Nevertheless, the secretary hopes to get his ideas laid out before proper committees this year. His strategy will be to "sell" them to farmers with the hope of winning enough Republican strength in Congress in 1958 to get his ideas enacted into law in 1959.

Failing this, he might well find his continuance in the Cabinet incompatible with the situation and outlook.

(3) EXCERPT FROM THE YORK GAZETTE AND DAILY

MAY 3, 1957

BENSON STUMPED BY FARM PROBLEM

He Says Production Can't Be Controlled, Past and Present Programs Have Failed and He Has No New Ideas

Washington (AP)—Secretary of Agriculture Benson said yesterday it has become virtually impossible to control farm production.

He said crop control and price support programs have been outdated by a "technological explosion" on the farm, and explained:

"Production per farm worker has doubled in the last 15 years. This creates a new dimension in farm policy and makes it virtually impossible to curtail agricultural output with the type of controls acceptable in our society."

Benson made these remarks in a letter to chairman Ellender (D-La) of the Senate Agricultural committee, who had asked the secretary to consider problems arising under existing price support legislation.

Benson wrote that major provisions of present farm laws have failed. He had criticism for crop control measures enacted under Democratic administrations in the late 1930s, and since amended, and also for the flexible price support system Congress accepted in 1954 at the urging of President Eisenhower and himself.

The secretary cautioned, too, against continuation of the soil bank reserve plan beyond its expiration date in

Excerpt from York Gazette and Daily

1959. Both Republicans and Democrats have taken credit for the soil bank concept. It is designed to reduce the huge surpluses of farm commodities held by the government.

While finding fault with past and present farm programs, Benson did not lay down any formula for the future.

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IN THE

Supreme Court of the United States

No. 894 Term, [redacted] 1957

UNITED STATES OF AMERICA,
Plaintiff

vs.

HENRY KISSINGER,
Defendant-Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

In re the Judgment entered by the United States Court of Appeals for the Third Circuit at No. 12,241

ANDREW WILSON GREEN,
Attorney for Petitioner

222 North Third Street,
Harrisburg, Pennsylvania.

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IN THE
SUPREME COURT OF THE UNITED STATES

No.

United States of America,

Plaintiff

vs.

Henry Kissinger,

Defendant-Petitioner

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner, Henry Kissinger, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above entitled case on January 8, 1958, at 12,241.

A. OPINIONS BELOW

The Opinion in this case of the Hon. Frederick V. Follmer, United States District Judge for the United States District Court for the Middle District of Pennsylvania, is attached hereto as Appendix "A". This Opinion has not been printed in any official or unofficial law reports. The Opinion in this case of the United States Court of Appeals for the Third Circuit is attached hereto as Appendix "B". This opinion has been printed in the 250 Federal 2nd Reporter 940.

B. JURISDICTION

The judgment sought to be reviewed is that of the United States Court of Appeals for the Third Circuit, No. 12,241, dated and entered January 8, 1958. No petition for rehearing has been filed with the United States Court of Appeals for the Third Circuit, or with the Supreme Court of the United States, and no petition for an extension of time within which to petition for certiorari has been filed with the Supreme Court of the United States. It is believed that jurisdiction to review the judgment of the United States Court of Appeals for the Third Circuit is conferred upon the Supreme Court of the United States by Title 28, United States Code, section 1254, which provides:

"Cases in the courts of appeal may be reviewed by the Supreme Court by the following methods:

Jurisdiction

"(1) By writ of certiorari granted on petition of any party to any civil or criminal case, before or after rendition of judgment or decree."

and by Title 28, United States Code, section 2101 (c), which reads:

"Any other appeal or any writ of certiorari intended to bring any judgment or decree in any civil act, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree."

Title 28 of the United States Code was passed as a single act of the Congress by the Act of June 25, 1948, c. 646, 62 Stat. 909.

C. QUESTIONS PRESENTED

1. Is a citizen of the United States to be deprived of a day in court to show by *evidence* that the enforcement of an Act of Congress has failed to accomplish its stated objectives, that its continued enforcement is unreasonable, and that therefore its continued enforcement is a violation of due process of law guaranteed by the Fifth Amendment of the Constitution.

2. Does the First Amendment which provides that Congress shall make no law prohibiting the free exercise of religion permit a farmer to be penalized for planting wheat when it is the religious conviction of the farmer that he should use his land and labor to realize the maximum fertility of his land.

D. STATUTE INVOLVED

The Agriculture Adjustment Act of 1938 as it relates to wheat quotas is in question. Since the statute is lengthy, pertinent parts of statute in question are set forth in Appendix "C" hereto.

E. BASIS OF JURISDICTION

The jurisdiction of the United States District Court over this proceeding is given section 1355 of the Title 28 of the United States Code, Judiciary and Judicial Procedure, as enacted by the Act of June 25, 1948, c. 646, 62 Stat. 909, which provides:

> "Sec. 1355. Fine, penalty or forfeiture.
>
> The district courts shall have original jurisdiction, exclusive of the courts of the States, of any action or proceeding for the recovery or enforcement of any fine, penalty, pecuniary or otherwise, incurred under any Act of Congress."

This jurisdiction is further confirmed by section 1345, of the same act which provides:

> "Section 1345. United States as plaintiff.
>
> Except as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by

the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress."

Further, the Agricultural Adjustment Act of 1938, c. 30, Title III, sec. 376, 52 Stat. 66, confers jurisdiction upon the United States District Courts; this act provides:

> "The several district courts of the United States are vested with jurisdiction specifically to enforce the provisions of this chapter. If and when the Secretary shall so request, it shall be the duty of the several United States Attorneys in their respective districts, under the direction of the Attorney General, to institute proceedings to collect the penalties provided in this chapter. The remedies and penalties provided for herein shall be in addition to, and not exclusive of, any of the remedies or penalties under existing law."

A penalty is provided under supplemental provisions to the Agricultural Adjustment Act of 1938, as amended, 52 Stat. 52, 7 U.S.C. 1340. The basic text of these supplemental provisions was passed by the Act of May 26, 1941, c. 133, 55 Stat. 203; with subsequent amendments providing minor alterations in the text; these amendments are: Dec. 26, 1941, ch. 626, sec. 2, 55 Stat. 860; Dec. 26, 1941, c. 636, 55 Stat. 872; Aug. 29, 1949, c. 518, sec. 3 (b), 63 Stat. 676; July 14, 1953, c. 194, sec. 3, 67 Stat. 151; Aug. 28, 1954, c. 1041, Title III, sec. 313, 68 Stat. 905. Since the text of this section applicable to this proceeding is long, it is given in Appendix "C" of this petition.

The Secretary of Agriculture requested the United States Attorney for the Middle District of Pennsylvania to bring this proceeding. See paragraph I of Complaint. This is the duty of the United States Attorney, as provided by

section 507 of Title 28 of the United States Code, Act of June 25, 1948, c. 646, 62 Stat. 909, which provides:

> "(a) Except as otherwise provided by law, it shall be the duty of the United States Attorney, within his district, to:
>
> • • • • • • • •
>
> (1) Prosecute or defend, for the government, all civil actions, suits or proceedings in which the United States is concerned."

The defendant, Henry Kissinger, resides at R. D., Millersburg, Dauphin County, Pa., which is within the jurisdiction of the United States District Court for the Middle District of Pennsylvania. See Paragraph 1 of Complaint. Venue lies in the district wherein the defendant resides, under the provisions of section 1391 (b) of Title 28 of the United States Code, Act of June 25, 1948, c. 646, 62 Stat. 909, which provides:

> "(b) a civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, except as otherwise provided by law."

F. ARGUMENT

I. IS A CITIZEN OF THE UNITED STATES TO BE DEPRIVED OF A DAY IN COURT TO SHOW BY *EVIDENCE* THAT THE ENFORCEMENT OF AN ACT OF CONGRESS HAS FAILED TO ACCOMPLISH ITS STATED OBJECTIVES, THAT ITS CONTINUED ENFORCEMENT IS UNREASONABLE, AND THAT THEREFORE ITS CONTINUED ENFORCEMENTS IS A VIOLATION OF DUE PROCESS OF LAW GUARANTEED BY THE FIFTH AMENDMENT OF THE CONSTITUTION?

In the present case the Plaintiff sought to show by *evidence* that the wheat marketing provisions of the Agricultural Adjustment Act had failed to achieve the objectives set forth in the Act, that therefore the enforcement of the Act had no reasonable relation to the objectives sought to be achieved in its enactment, and that therefore its continued enforcement is contrary to due process of law as guaranteed by the Fifth Amendment to the Constitution of the United States. The desire of the Defendant to introduce *evidence* to show these things was pleaded in his Answer (see Paragraph 13 (a) and Paragraph 14 (2) of the Answer) and therefore was before the United States District Court.

After the Defendant's Answer the Plaintiff filed a Motion For Summary Judgment which was granted by the United States District Court.

Argument

The right of the Defendant to introduce evidence to show the failure of the Agricultural Adjustment Act was not discussed in the Opinion of the U. S. District Judge (Follmer, District Judge), who relied upon the case of *Wickard v. Filburn*, 1942, 317 U.S. 111.

In the Opinion of the United States Court of Appeals for the Third Circuit, (Maris, Kalodner and Staley, Circuit Judges) this question was dealt with as follows.

> "• • • The defendant nonetheless asserts that even though the Act has been upheld as a valid exercise of congressional power he should have been permitted by the district court to show by evidence that it has failed to achieve its objectives with respect to wheat. We do not agree. Once the question of constitutional power is answered in the affirmative the wisdom, need and effectiveness of a particular statute enacted in the exercise of that power is a question for the Congress not the courts. Oklahoma v. Atkinson Co., 1941, 313 U.S. 508, 527; Wickard v. Filburn, 1942, 317 U.S. 111, 129. • • •"

The U. S. Court of Appeals also cites in support of this position *Arizona v. California*, 1931, 283 U.S. 423, 456, and *Everard's Breweries v. Day*, 1924, 265 U.S. 545, 559.

In the present case we have the highly dubious procedure where the U. S. District Court ignored in its Opinion the constitutional question raised by the Defendant, and in the U. S. Court of Appeals dealt with the constitutional question raised by the Defendant by citing inapposite cases.

The opinions of the Supreme Court of the United States in the past have always distinguished between situ-

ations in which an Act of Congress was unconstitutional on its face, and an Act which, although constitutional on its face, was unconstitutional in its operation. The United States Court of Appeals has answered our contention that the Agricultural Adjustment Act is unconstitutional in its operation though valid on its face by citing cases which did not involve the issue of the unconstitutional operation of an Act valid on its face.

The distinction on which we rely is upheld by several opinions of the Supreme Court of the United States, a great number of opinions of the lower federal courts, and the courts of the various states. Such are the cases of *Weaver v. Palmer Bros. Co.*, 270 U.S. 402, 410 (1925); *United States v. Carolene Products Co.*, 304 U.S. 144, 153 (1938); and *Snowden v. Hughes*, 321 U.S. 1, 8 (1944).

In *Snowden v. Hughes*, supra, Mr. Chief Justice Stone said:

> "The unlawful administration by state officers of a state statute fair on its face, resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection, unless there is shown to be present in it an element of intentional or purposeful discrimination. This may appear on the face of the action taken with respect to a particular class or person * * * *or it may be shown by extrinsic evidence*, showing a discriminatory design to favor one individual or class over another not to be inferred from the action itself." (321 U.S. 8) (Emphasis added.)

In *U. S. v. Carolene Products Co.*, supra, Mr. Justice Stone said:

> "Where the existence of a rational basis for legislation whose constitutionality is attacked depends upon

facts beyond the sphere of judicial notice, such may properly be made the subject of judicial inquiry." (304 U.S. 153)

An in *Weaver v. Palmer Bros. Co.*, supra, Mr. Justice Butler said:

> "Legislative determinations expressed or implied are entitled to great weight; *but it is always open to interested parties to show that the Legislature has transgressed the limits of its power.* * * * Invalidity may be shown by things which will be judicially noticed * * * or * * * established by evidence." (270 U.S.410) (Emphasis added.)

While the highest courts of some states (notably Indiana) hold that on the question of unconstitutionality the only facts which may be considered by the court are those which can be judicially noticed, this is the minority rule. The Supreme Court of the United States and the federal courts have until this time consistently held that evidence may be introduced to show the unconstitutional operation of a statute valid on its face. (See the annotation of *United States v. Carolene Products Co.*, supra, in 82 L. ed. 1244.)

There is no excuse for the District Court or the Court of Appeals in the present case for failing to follow the precedents of the Supreme Court of the United States on this question. In addition to the authority which we have just mentioned, we cited before the District Court and the Court of Appeals the following authorities:

Opinions of the Supreme Court of the United States:

Kennedy v. Silas Mason Co., 334 U.S. 249;

Eccles v. Peoples Bank, 333 U.S. 426;

Arenas v. United States, 322 U.S. 419;

Pacific States Co. v. White, 296 U.S. 176;

Nashville C. & St. L. R. Co. v. Walters, 294 U.S. 176;

Borden's Farm Products v. Baldwin, 294 U.S. 405, 415;

Chastleton Corp. v. Sinclair, 264 U.S. 543;

Muller v. Oregon, 208 U.S. 412, where Louis Brandeis won his case by putting extensive tables of statistics in his brief to show there was a reasonable basis in fact to support the challenged legislation.

Opinions of the lower federal courts:

Pacific American Fisheries v. Mullany, 191 F. 2d. 137;

Moss v. Hawaiian Dredging Co., 187 F. 2d 442, 446;

Farrell v. District of Columbia A.A.U., 153 F. 2d 647;

Arkansas v. Cent. Sur. and Ins. Co., etc., 102 F. Supp. 444;

Law v. City of Baltimore, 87 F. Supp. 346, 351;

Bouchert v. City of Ranger, 42 F. Supp. 577, 580;

Paramount Pictures v. Langer, 22 F. Supp. 890, 897.

Opinions of the various state supreme courts:

East New York Sav. Bank v. Hahn, 293 N.Y. 662, 59 N.E. 2d 625;

Harrisburg Dairies v. Eisaman, 328 Pa. 195, 195 A. 337;

Pennsylvania R. Co. v. Driscoll, 330 Pa. 97, 198 A. 130, 134;

Harrisburg Dairies v. Eisaman, 338 Pa. 58, 11 A. 2d 875, 877;

Waller v. Commonwealth, 178 Va. 294, 16 S.E. 2d 808;

Ritholz v. Johnson, 244 Wisc. 494, 12 N.W. 738 (1944).

And the following text authorities:

Barron and Holtzhoff on Federal Practice, section 1247;

Bikle, Prof. Henry Wolf, 38 Harvard Law Review 6;

Moore on Federal Practice, section 56.17 (10), section 56.16;

Wigmore, John Henry, Treatise on Evidence, 3rd Edition, section 255(d);

Corpus Juris Secundum, Constitutional Law, section 97;

30 *Columbia Law Review* 360;

49 *Harvard Law Review* 631.

The question then boils down to whether the Supreme Court of the United States is going to permit the District Court and the Court of Appeals to overrule by *silence* the foregoing legal authorities, including almost a dozen opinions of the Supreme Court of the United States. Unless the Supreme Court of the United States is willing to tolerate a flagrant disregard of the precedents of its numerous rulings on the point at issue by the lower federal courts, this petition for a writ of certiorari must be granted.

Argument

If the Supreme Court of the United States is now going to sanction a change in the rule on this question which it has uniformly and consistently adhered to in the past, then it seems to us that such a sanction should not be given by indirection, that is by the denial of the present Petition for a Writ of Certiorari. A sanction of your Honorable Court for a change in this rule should only be given after full argument on the merits of this question. Consequently, if the Supreme Court of the United States is of the opinion that the ruling on this question of the Court of Appeals should be upheld, then it should sanction this change openly after argument and opinion, and therefore the Petition for a Writ of Certiorari should be granted.

We will not say in this Petition much concerning the merits of whether the rule heretofore adhered to by the Supreme Court of the United States is correct, since the merits should be properly argued after the Petition for a Writ of Certiorari is granted. However, we do feel that a brief statement by us on the argument why the position of the Supreme Court of the United States on this question heretofore has been correct, is in order at this time. If the Supreme Court of the United States were to hold that once a statute has been upheld as constitutional by it, thereafter its operation may not be shown to be unconstitutional, either by evidence or by facts within judicial notice, such a rule would result in the vice of both too much power and too little power for the courts. It would extend the judicial power too far because such a custom would in effect make the court a legislature which would validate unconstitutional operation of statutes which of course can only be done by the formal amendment of the Constitution. It would restrict the judicial power too much because it

would deny to the courts the power to correct the unconstitutional operation of a statute. It is inconceivable to us the Supreme Court of the United States would wish to abdicate its right to challenge the unconstitutional operation of a statute merely because it was valid on its face.

II. DOES THE FIRST AMENDMENT WHICH PROVIDES THAT CONGRESS SHALL MAKE NO LAW PROHIBITING THE FREE EXERCISE OF RELIGION PERMIT A FARMER TO BE PENALIZED FOR PLANTING WHEAT WHEN IT IS THE RELIGIOUS CONVICTION OF THE FARMER THAT HE SHOULD USE HIS LAND AND LABOR TO REALIZE THE MAXIMUM FERTILITY OF HIS LAND?

To the contention of the petitioner that by reason of his religious training and belief he considers it morally wrong and contrary to the teachings of Holy Scripture to limit the production of his farm so that it produces any lessor amount of food than it is capable of producing, subject to the knowledge and judgment of farming which God has given him, that therefore a restraint upon his obtaining such maximum production is a violation of the free exercise of his religion guaranteed by the First Amendment to the Constitution, the Court of Appeals has made the following answers:

(1) "The penalties under the act were not imposed upon him because he produced the excess wheat but only because he marketed it."

(2) "Freedom of religion guaranteed by the First Amendment does not include freedom from all

regulation of an individual's acts and conduct as contradistinguished from his belief."

To the first answer of the Court of Appeals the reply of the petitioner is that the record contains no proof whatsoever that he marketed any of the wheat in question. It is apparent that any casual study of the wheat quota laws and regulations will show that the penalty for planting wheat in excess of quota attaches the moment the wheat is planted. While it is true that subject to certain subsequent actions of the petitioner, the petitioner may avoid the penalty, nevertheless we believe that the correct view of the penalty provisions is that a penalty is imposed upon the planting. It is therefore not true to say in regard to the petitioner as does the Court of Appeals that the penalty is imposed for "the sale of it in the channels of commerce".

In regard to the second answer of the Court of Appeals, as we pointed out in our Brief before it, the question presented when the protection of the First Amendment is sought by an individual from otherwise applicable laws is: "How much are the activities * * * at issue those of commerce and how much are they those of religious practice?"

In determining this question, it should be kept in mind that agriculture should be distinguished from other commercial activities, since its product is not the mere result of human labor, but the result of the combination of human labor and God's Providence. Man may plant but only with God's will does he reap.

No dependence upon mechanical rules of nature, or no exercise of persistence will successfully produce a crop. Man plants, and then he waits. Without the favor of God's growth, there will be no yield. God alone, despite

any efforts of man, has the power to grant or withhold the increase.

Can the petitioner in the present case make the grain of wheat grow after putting it in the ground? Can he by the mere adjustment of machines and the pressing of a button, produce wheat?

It is therefore seen that agriculture is of a more sacred nature than other commercial activities, being as it is so utterly dependent upon the favor of God that its practice may truly be said by a pious man to be a religious obligation, sacramental in character.

The Courts have held that many secular activities are so imbued with religious implications, that they fall within the protection of the First Amendment. For example: Jehovah's Witnesses have a right to refuse to salute the flag, *Board of Education v. Barnette*, 319 U.S. 624, 63 S. Ct. 1178, 87 L. Ed. 1628 (1943); a person has the right to refuse to serve on a jury for conscientious reasons, *U. S. v. Hillyard*, 52 F. Supp. 612 (1943); and a person may not be deprived of property because his professed religious beliefs offend the government, *Jinsha v. McGrath*, 90 F. Supp 892 (1950).

While it is true that recent cases of the United States Courts of Appeal have ruled against those claiming the protection of the First Amendment in the exemption of the regulation of their commercial activities, such as *Mitchell v. Pilgrim Holiness Church Corporation*, 210 F. 2d 879 (1954), cert. den. 347 U.S. 1013, 74 S. Ct. 867, 98 L. Ed. 1136, and *Wicks v. Southern Pacific Co.*, 121 F. Supp. 454 (1954), affirmed 231 F. 2d 130 (1956), cert den. 351 U.S. 946, 76 S. Ct. 845, 100 L. Ed. 1471, these cases are distinguishable from the present case.

Argument

The operation of a printing press can be accomplished by man's efforts alone with a mere mechanical dependence upon static rules of nature. The operation of a railroad may be impeded by inclement weather, but the freight can be delivered despite these difficulties by the exercise of persistence. But no dependence upon static rules of nature, or no exercise of persistence, will make a grain of wheat grow. In agriculture, God's intervention is no distant and impersonal thing, but an intervention in history, in time.

But apart from this, there is considerable doubt that the *Pilgrim Holiness Church* case, or the *Wicks* case, supra, were correctly decided. The denial of a writ of certiorari by the Supreme Court of the United States in those cases does not imply any approval of the lower court opinions which it refused to review, but only that no issues of sufficient importance were raised therein to merit review. We believe our present case is not governed by the *Pilgrim Holiness Church* case, or the *Wicks* case, but in the event the present case is so governed, a useful purpose would be served by granting certiorari in the present case to determine more precisely the exact line between those religious activities with commercial overtones which are within the protection of the First Amendment from regulation, and those which are outside of the protection of the First Amendment.

SUPPLEMENT TO ARGUMENT—PETITIONER'S RELIGIOUS VIEWS

My client has insisted that we present in this Petition for a Writ of Certiorari the basis for his religious convictions that it is contrary to his conscience to obey the wheat

quota laws, and therefore oppressive of his practice of religion as protected by the First Amendment to the Constitution. His insistence was so strong that we were unable to have his consent to the filing of this Petition unless some presentation of his religious views was made in this Petition.

It is a little irregular in our opinion to present matters which are evidential in character which are not in the record, and therefore not perhaps fully and adequately argued before the lower courts and considered by them in their Opinions. We do not feel too apologetic in this instance because the petitioner has not been given an opportunity in the lower court to set forth his particular religious views. Furthermore, this is a case involving religious freedom under the First Amendment, and is therefore unusual in and of itself, and we are hoping that perhaps your Honorable Court will be somewhat indulgent if our Petition is a little out of the ordinary.

We are therefore going to summarize the religious views of the Petitioner in this matter as he has presented them to us, and as we understand them, from the particular passages of Scripture on which he relies to support his position. In the *concrete*, they may not be relevant in the consideration of this case, but in the *abstract*, we believe the religious views we present may be properly considered by your Honorable Court. That is, your Honorable Court may consider them abstractly as to whether or not a person holding in good faith the religious views we are going to set forth below, and acting in the manner in which the Petitioner has acted, would be entitled to claim exemption from the regulation of the wheat quota laws on the basis that their enforcement against him would be oppressive of his right to the free practice of his religion guaranteed by

the First Amendment to the Constitution. These religious views are as follows.

(1) *Man ought not to interfere with the Providence of God.*

God controls the harvest and what quantity the harvest is to be, either large or small; See your Holy Bible, Genesis, Chapter 41, and the right one has to that grain, either large or small, in Ecclesiastes 5:8 to 20.

(2) *Even though a man or nation has plenty, it is still his duty to labor and bring forth fruit.*

See your Holy Bible, St. Luke 12:13 to 20; See St. Luke 19:12 to 27; also St. Luke 12:48.

(3) *Render therefore unto Caesar the things which are Caesar's; and unto God the things that are God's.* St. Matthew 22:17 to 22.

The petitioner is not claiming freedom from all regulations or laws in the guise of his religion, as the court implies. Man and government must know at what point the law belongs to God and at which point the law belongs to government. See your Holy Bible, I Samuel 12:13 to 25. The petitioner is concerned with regulations or laws when they interfere with his right of free exercise of religious practice as is guaranteed to all our citizens by the First Amendment to our Constitution. See your Holy Bible, Exodus, Chapter 20. "Thou shalt have no other gods before me." "Thou shalt not kill." "Thou shalt not steal." "Thou shalt not bear false witness against thy neighbor." "Thou shalt not covet thy neighbor's house, thou shalt not covet thy neighbor's wife, nor his manservant, nor his maidservant, nor his ox, nor his ass, nor anything that is thy neighbors." The definition of one's neighbor is given in your Holy Bible, St. Luke, Chapter 10:29 to 37, inc.

Argument

There is some misunderstanding about the operation of the wheat quota laws in practice. It may be argued that the Petitioner can avoid the penalties by storing the grain on his farm, but such storage is always for the use of the Secretary of Agriculture. This is forced charity, as we shall explain. Another way in which the Petitioner may be able to avoid the penalty is by agreeing to reduce his planting for the next year's wheat crop by the amount he has overplanted this year's wheat crop. This would limit planting and production, as the Court of Appeals denies. The Petitioner knows that your Honorable Court will not find any regulation justifying this practice, but it occurs, and the Petitioner feels that your Honorable Court should investigate to determine whether or not such irregular practices are occurring in the enforcement of the wheat quota laws.

It may be argued that it is the Petitioner's duty to Caesar to turn over the grain to the government at the end of the harvest season, or to store his grain for the benefit of the government. However, the turning over of the grain in such a case is not the payment of a tax, it is a confiscation, and is contrary to every one of the above quoted passages from Exodus, Chapter 20. To give the wheat to the government in these circumstances would be forced charity, and charity must come from love and free will of the heart of the giver. See your Holy Bible, Acts, Chapter 11:27 to 30; II Corinthians, Chapter 9:5 to 15; Romans, Chapter 15:26; I Corinthians, Chapter 16:1 & 2.

(4) *The wheat quota laws are an oppression upon the people, and God will punish a nation which oppresses its people thus.*

In your Holy Bible, Chapters 2 and 3 of the Book of Micah, is the description of our very own conditions today, just as they were in those days. Please read the warning.

(5) *Conclusion. It is man's duty to obey God.*

In your Holy Bible, the record in Philippians gives an account of Paul to the church at Philippi. The Petitioner would if he could appear to the court to give an accounting of himself before the court as did the Apostle Paul to the church. The petitioner would also show that he and his accusers were not perfect and would point out to them the requirements of God. This accounting would be very much the same as was the Apostle Paul's. The Petitioner would read to the court as one thought, Philippians, Chapter 1:2, 7 to 30; Chapter 2:1 to 16; Chapter 3:1, 2, 3 and 8 to 21; Chapter 4:1, & 4 to 13, inclusive; Exodus, Chapter 20. So by this reading of scripture one can see that man cannot live by bread but by every word that proceedeth out of the mouth of God. St. Matthew, Chapter 4:4. Some men have a conscience and morals about every day life and feel there is no compromise with wrong; just as Jesus Christ did not compromise with wrong. See your Holy Bible, Deuteronomy, Chapter 30:9 to 20.

CONCLUSION

Wherefore, we urge your Honorable Court to grant the above Petition For a Writ of Certiorari to the United States Court of Appeals for the Third Circuit upon either or both of the grounds set forth in this Petition, and that this Petition if containing merit on one ground should not be denied because of being without merit on the other ground.

Respectfully submitted,

ANDREW WILSON GREEN,

Attorney for Petitioner.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
Middle District of Pennsylvania

Civil No. 5485

United States of America

vs.

Henry Kissinger

OPINION OF HON. FREDERICK V. FOLLMER

The United States of America instituted this action against Henry Kissinger to recover civil penalties under the Agricultural Adjustment Act of 1938, as amended, 7 U.S.C. §1281 et seq., alleging that defendant failed to store or deliver to the Secretary any part of the farm marketing excess of wheat in accordance with the requirements of the Act and the regulations promulgated thereunder. Plaintiff has filed motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure.

The Secretary of Agriculture, pursuant to the provisions of the Agricultural Adjustment Act, on June 30, 1953, by proclamation duly filed (18 F.R. 3780-1) declared

a National Marketing quota in effect with respect to the marketing of wheat during the 1954-1955 marketing year. Notice of a referendum of farmers who would be subject to the quota, as required by 7 U.S.C. §1336, was duly promulgated, 18 F.R. 4221. On September 22, 1953, a proclamation was duly issued (18 F.R. 5707) announcing the results of the Wheat Marketing Quota Referendum for the marketing year 1954-1955, which proclamation stated "Therefore, wheat marketing quotas will be in effect for the 1954-55 marketing year."

The defendant contends that he did not receive a personal notification of the fact that wheat marketing quotas were in effect for the 1954-1955 marketing year. There is no such requirement in the Act. This matter was fully covered by the administrative action properly filed and published in the Federal Register as indicated above. The requirement of 7 U.S.C. §1362 is that "Notice of the farm marketing quota of his farm shall be mailed to the farmer." He does not deny that he received the "Notification Of 1954 Wheat Acreage Allotment" establishing a wheat allotment of 16 acres for 1954 for his farm. His answer in this respect, however, alleges "It is admitted that the defendant received notification of 1954 wheat acreage allotment in a form similar to that set forth in Exhibit A, attached hereto and made a part hereof. However, the original notification was inadvertently destroyed by the defendant, and the defendant requested another copy of this notification from the Dauphin County Production and Marketing Administration Committee, who sent him a notification, a copy of which is attached hereto as Exhibit A. However, the defendant believes that the second notification sent to him differs from the first in

that the first did not include the words 'and for farm marketing quotas if marketing quotas are applicable for the 1954 wheat crop', and also 'if marketing quotas are applicable to the 1954 crop of wheat', as underlined on the said Exhibit A, or any other words pertaining to quotas. Except as hereinabove stated, Paragraph 4 is admitted."

An affidavit in support of the motion for summary judgment attaches a copy of the Form GR-308-WHEAT (1954) (4-28-53), which was sent to defendant and avers "That the wording contained in said notice is the same as the wording on all other such notices used for the notification of 1954 Wheat Acreage Allotments as printed by the United States Government Printing Office coded 1953-252926." and "That all 1954 Wheat Acreage Allotment notices marked, 'copy', 'second run', 'duplicate', 'correction', etc. which were mailed from this office were from the same government printing order (1953-252926)." This is not denied.

This lack of memory of defendant does not rise to the dignity of creating a genuine issue of fact.[1] Neither does it raise a material issue of fact since he must be charged with knowledge of the original declaration of the Secretary of Agriculture and of the result of the referendum vote by the farmers affected thereby, in which referendum he either did or should have participated. Upon his failure to apply for review of the determination of his farm marketing quota, as required by the Act, it became final, 7 U.S.C. §1363. That he subsequently received on or about June 2, 1954, the "Notice Of 1954 Farm Marketing Quota

[1] Chandler Laboratories v. Smith, D.C. E.D. Pa., 88 F. Supp. 583; McClellan v. Montana-Dakota Utilities Co., D.C. Minn., 104 F. Supp. 46, Affirmed 8 Cir., 204 F. 2d 166.

And Farm Marketing Excess Of Wheat" for his farm, and that he made no application for downward adjustment in the marketing excess as provided in the Act, is not in dispute.

There is therefore no genuine or material issue of fact. On the facts pleaded plaintiff is clearly entitled to judgment. Defendant's main reliance appears to be on the question of the constitutionality of the Act. This precise issue was before the Court of Appeals of this Circuit in United States v. Mumma, 3 Cir., 237 F. 2d 795, Cert. Den. Feb. 26, 1957, not yet reported, and that court there said "Appellant's sole contention is that the Act is unconstitutional. In line with this, she argues that Wickard v. Filburn, 1942, 317 U.S. 111, 63 S. Ct. 82, 87 L. Ed. 122, which upheld the constitutionality of the Act and the cases which followed that decision, including our own Blattner v. United States, 3 Cir., 1955, 223 F. 2d 468, were all decided erroneously. We disagree with that view."

The motion for summary judgment will therefore be granted. Let Order be submitted accordingly.

(s) Frederick V. Follmer
United States District Judge

March 1, 1957.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12,241

UNITED STATES OF AMERICA
v.
HENRY KISSINGER,
Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Argued November 6, 1957
Before MARIS, KALODNER and STALEY, *Circuit Judges*

OPINION OF THE COURT

(Filed January 8, 1958)

By MARIS, *Circuit Judge.*

This is an appeal by the defendant from a judgment rendered against him in the District Court for the Middle District of Pennsylvania in an action brought by the United States for the purpose of collecting civil penalties under the Agricultural Adjustment Act of 1938, as amended.[1]

[1] 7 U.S.C.A. §§ 1281 et seq.

The penalties sued for were alleged to have been incurred by the defendant, who is a farmer, by reason of his having produced on his farm and marketed an amount of wheat in excess of the farm marketing quota imposed upon him under the Act for the 1954 crop of wheat. The defendant does not here dispute that such a quota was imposed upon him in that year or that he produced and marketed an excess of wheat over his quota. His defense is that the Act is unconstitutional in that having failed of its aim in regard to wheat its enforcement violates the Due Process Clause of the Fifth Amendment and in that as applied to him it interferes with his exercise of a religious duty and, therefore, violates the First Amendment.

The United States urges that the defendant is precluded from asserting these defenses in this case because he failed to exhaust his administrative remedies in that he did not apply to have his farm marketing quota reviewed by the local review committee set up under the Act.[2] We cannot agree with the Government's contention in this regard. We do not think that Congress, by stipulating in the Act for the review of a farm marketing quota by a review committee, can prevent an aggrieved farmer from raising the question of the Act's constitutionality for the first time in the district court as a defense to an action for penalties under the Act. For the question of the constitutionality of the Act is quite a different question from whether the farmer's quota is proper and it is a question with which a committee set up under the Act is not competent to deal since its sole authority is derived from the Act and disappears if the Act is unconstitutional. See Davis, Administrative Remedies Often Need Not Be Ex-

[2] 7 U.S.C.A. § 1363.

hausted, 19 F.R.D. 437, 454, and compare Yakus v. United States, 1944, 321 U.S. 414, and Bowles v. Willingham, 1944, 321 U. S. 503, with Miller v. United States, 6 Cir. 1957, 242 F. 2d 392.

Turning then to the defendant's constitutional contentions we find them to be wholly without merit. The constitutionality of the Agricultural Adjustment Act as a valid exercise of congressional power under the Commerce Clause of the Constitution has been settled beyond peradventure of doubt. Mulford v. Smith, 1939, 307 U.S. 38; Wickard v. Filburn, 1942, 317 U.S. 111; Secretary of Agriculture v. Central Roig Refining Co., 1950, 338 U.S. 604. The defendant nonetheless asserts that even though the Act has been upheld as a valid exercise of congressional power he should have been permitted by the district court to show by evidence that it has failed to achieve its objectives with respect to wheat. We do not agree. Once the question of constitutional power is answered in the affirmative the wisdom, need and effectiveness of a particular statute enacted in the exercise of that power is a question for the Congress not the courts. Oklahoma v. Atkinson Co., 1941, 313 U.S. 508, 527; Wickard v. Filburn, 1942, 317 U.S. 111, 129. Thus it has been held that whether a particular statutory enactment under the Commerce Clause is reasonably necessary is not for the courts to determine. Arizona v. California, 1931, 283 U.S. 423, 456. They do not have power to inquire into either the degree of the necessity for such legislation or its wisdom or effectiveness. Everard's Breweries v. Day, 1924, 265 U.S. 545, 559.

The defendant's contention under the First Amendment is equally without merit. His contention is that since by reason of his religious training and belief he considers

it morally wrong and contrary to the teachings of the Holy Scriptures to limit the production of his farm so that it produces any lesser amount of food than it is capable of producing, subject to the knowledge and judgment of farming which God has given him, it is a violation of his constitutional right of religious freedom to restrain him from obtaining such maximum production.

There are two answers to defendant's contention in this regard. The first is that the penalties under the Act were not imposed upon him because he produced the excess wheat but only because he marketed it. For the Act expressly provides that the Secretary of Agriculture shall issue regulations under which the farm marketing excess for a farm may be stored or delivered to him for relief purposes and only upon failure to thus store or deliver to the Secretary the farm marketing excess within the time fixed by such regulations is the producer required to pay the penalties thereon.[3] It thus appears that the defendant

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[3] "(3) The farm marketing excess for wheat shall be regarded as available for marketing, and the penalty and the storage amount or amounts to be delivered to the Secretary of the commodity shall be computed upon the normal production of the excess acreage. Where, upon the application of the producer for an adjustment of penalty or of storage, it is shown to the satisfaction of the Secretary that the actual production of the excess acreage is less than the normal production thereof, the difference between the amount of the penalty or storage as computed upon the basis of normal production and as computed upon the basis of actual production shall be returned to or allowed the producer. The Secretary shall issue regulations under which the farm marketing excess of the commodity for the farm may be stored or delivered to him. Upon failure to store or deliver to the Secretary the farm marketing excess within such time as may be determined under regulations prescribed by the Secretary, the penalty computed as aforesaid shall be paid by the producer. Any wheat delivered to the Secretary hereunder shall become the property of the United States and shall

was perfectly free to produce all the wheat which his land was capable of producing and if he had stored or delivered to the Secretary of Agriculture the excess over his quota he would not have been subject to any penalty whatever. It will thus be seen that it was not the production of the wheat, which the defendant's conscience requires of him, but the sale of it in the channels of commerce instead of its storage or delivery for relief purposes which brought about the imposition of the penalties for which the present suit was brought.

The second answer to defendant's contention under the First Amendment is that the freedom of religion guaranteed by the First Amendment does not include freedom from all regulation of an individual's acts and conduct as contradistinguished from his beliefs. On the contrary, the enforcement of a reasonable nondiscriminatory regulation of conduct by governmental authority to preserve peace, tranquility and a sound economic order does not violate the First Amendment merely because it may inhibit conduct on the part of individuals which is sincerely claimed by them to be religiously motivated. Davis v. Beason, 1890, 133 U.S. 333, 342-345; Prince v. Massachusetts, 1944, 321 U.S. 158, 163-171; Poulos v. New Hampshire, 1953, 345 U.S. 395, 405; Mitchell v. Pilgrim Holiness Church Corp., 7 Cir. 1954, 210 F. 2d 879, 884-885, cert. den. 347 U.S. 1013.

The judgment of the district court will be affirmed.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

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be disposed of by the Secretary for relief purposes in the United States or in foreign countries or in such other manner as he shall determine will divert it from the normal channels of trade and commerce." 7 U.S.C.A. § 1340(3).

APPENDIX C

The statute involved in this appeal is found in 7 U.S. C. 1340. The basic text of this provision was enacted by the Act of May 26, 1941, c. 133, 55 Stat. 203. Subsequent minor amendments are enacted in the following legislation: Acts of Dec. 26, 1941, c. 626, sect. 2, 55 Stat. 860; Dec. 26, 1941, c. 636, 55 Stat. 872; Aug. 29, 1949, c. 518, sect. 3 (b), 63 Stat. 676; July 14, 1953, c. 194, sect. 3, 67 Stat. 151. A later amendment to the section was passed by the Act of Aug. 29, 1954, c. 1041, Title III, sect. 313, 68 Stat. 905, making its provisions inapplicable to corn. The text of this statute as it applies to the present case is set forth below:

"Sect. 1340 Supplemental provisions relating to wheat marketing quotas; marketing penalty for rice; crop loans on cotton, wheat, rice, tobacco, and peanuts:

Notwithstanding the other provisions of this chapter—

(1) the farm marketing quota under this chapter for any crop of wheat shall be the actual production of the acreage planted to wheat on the farm, less the normal production or the actual production, whichever is the smaller, of that acreage planted to wheat on the farm which is in excess of the farm acreage allotment for wheat.

The normal production, or the actual production, whichever is the smaller, of such excess acreage is hereinafter called the "farm marketing excess" of wheat. For the purposes of this section "actual production"

of any number of acres of wheat on a farm means the actual average yield of wheat for the farm times the number of such acres.

(2) During any marketing year for which quotas are in effect, the producer shall be subject to a penalty on the farm marketing excess of wheat. The rate of penalty on wheat shall be 45 per centum of the parity price per bushel of wheat as of May 1 of the calendar year in which the crop is harvested.

(3) The farm marketing excess for wheat shall be regarded as available for marketing, and the penalty and the storage amount or amounts to be delivered to the Secretary of the commodity shall be computed upon the normal production of the excess acreage. Where, upon the application of the producer for an adjustment of penalty or of storage, it is shown to the satisfaction of the Secretary that the actual production of the excess acreage is less than the normal production thereof, the difference between the amount of the penalty or storage as computed upon the basis of normal production and as computed upon the basis of normal production shall be returned to or allowed the producer. The Secretary shall issue regulations under which the farm marketing excess of the commodity for the farm may be stored or delivered to him. Upon failure to store or deliver to the Secretary the farm marketing excess within such time as may be determined under regulations prescribed by the Secretary, the penalty computed as aforesaid shall be paid by the producer. Any wheat delivered to the Secretary hereunder shall become the property of the United States and shall be disposed of by the Secretary for

relief purposes in the United States or in foreign countries or in such other manner as he shall determine will divert it from normal channels of trade and commerce.

(4) Until the producers on any farm store, deliver to the Secretary, or pay the penalty on, the farm marketing excess of any crop of wheat, the entire crop of wheat produced shall be subject to a lien in favor of the United States for the amount of the penalty.

(5) The penalty upon wheat stored shall be paid by the producer at the time, and to the extent, of any depletion in the amount of the commodity so stored, except depletion resulting from some cause beyond the control of the producer.

(6) Whenever the planted acreage of the then current crop of wheat on any farm is less than the farm acreage allotment for such commodity, the total amount of the commodity from any previous crops required to be stored in order to postpone or avoid payment of penalty shall be reduced by the amount which is equal to the normal production of the number of acres by which the farm acreage allotment exceeds the planted acreage. The provisions of section 1326 (b) and (c) of this title shall be applicable also to wheat.

(7) A farm marketing quota on wheat shall not be applicable to any farm on which the acreage planted to the commodity is not in excess of fifteen acres. The marketing penalty on wheat shall not be applicable to any farm which, under the terms of the then agricultural conservation program formulated under sections 590g, 590h, 590i, 590j-590q of Title 16, is classified as a nonallotment farm, etc. * * *

(8) Until the farm marketing excess of wheat is stored or delivered to the Secretary or the penalty thereon is paid, each bushel of the commodity produced on the farm which is sold by the producer to any person within the United States shall be subject to the penalty as specified in paragraph (2) of this section. Such penalty shall be paid by the buyer who may deduct an amount equivalent to the penalty from the price paid to the producer.

(9) The marketing penalty for rice, etc. * * *

(10) The Commodity Credit Corporation is directed to make available upon the 1941, 1942, 1943, 1944, 1945 and 1946 crops, etc. * * *

(11) The provisions of the section are amendatory of and supplementary to this chapter, and all provisions of law applicable in respect to marketing quotas and loans under such chapters as so amended and supplemented shall be applicable, but nothing in this section shall be construed to amend or repeal sections 1301(b)(6), 1323(b), or 1335(d) of this title.

(12) Notwithstanding any of the foregoing provisions, the farm marketing excess for any crop of wheat shall not be larger than the amount by which the actual production of such crop of wheat on the farm exceeds the normal production of the farm wheat acreage allotment, if the producer establishes such actual production to the satisfaction of the Secretary. Where a downward adjustment in the amount of the farm marketing excess is made pursuant to the provisions of this paragraph, the difference between the amount of the penalty or storage as computed upon the adjusted farm marketing excess shall be returned to or allowed the producer."

THE RECORD

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

No. 5485 Civil

United States of America,

Plaintiff

vs.

Henry Kissinger,

Defendant

I.

COMPLAINT

Plaintiff, for cause of action against defendant, alleges:

I.

That J. Julius Levy, United States Attorney for the Middle District of Pennsylvania, acting under the direction of the Attorney General, upon request of the Secretary of Agriculture, hereinafter referred to as "the Secretary", brings this complaint under the provisions of the Agricultural Adjustment Act of 1938, as amended and supplemented (7 U.S.C. 1281 to 1393; Act of January 30,

1954, 68 Stat. 4; and Act of August 28, 1954, 68 Stat. 897), hereinafter referred to as "the Act", to collect penalties provided in the Act from defendant. This Court has jurisdiction of the subject matter of this action under the provisions of Section 376 of the Act (7 U.S.C. 1376), and Title 28, United States Code, Section 1345. Defendant, whose mailing address is Millersburg, resides in Dauphin County, in said State, and within the jurisdiction of this Court.

II.

After the performance and occurrence of all conditions precedent the marketing quota provisions of the Act were made effective with respect to the 1954 crop of wheat for the marketing year beginning July 1, 1954 (7 U.S.C. 1301, 1332, 1333, 1335; 18 F.R. 2417, 3780, 4166; 7 U.S.C. 1336; 18 F.R. 4221, 5707), and pursuant to the Act (7 U.S.C. 1375) the Secretary issued regulations pertaining to acreage allotments (18 F.R. 2621, 3161, 4047; 19 F.R. 972, 1336, 1562), and marketing quotas (18 F.R. 6711; 19 F.R. 202, 1481, 2763, 6134, 6879, 8500; 20 F.R. 24, 189, 1200) for the 1954 crop of wheat, hereinafter referred to as "the regulations".

III.

Wheat was planted for harvest in 1954 on the farm in Dauphin County, Pennsylvania, identified under the regulations (Reg. Sec. 728.454) by Serial No. 2B-10, hereinafter referred to as "the farm", and all or part of such wheat was harvested prior to January 31, 1955. Defendant, as owner, landlord, tenant or sharecropper, was entitled to all of a share of such crop of wheat or of the proceeds thereof and under the Act and regulations was a producer of wheat on the farm with respect to the 1954 crop (Reg. Sec. 728.451(1)).

IV.

After the performance and occurrence of all conditions precedent and in accordance with the Act and regulations (7 U.S.C. 1334; 18 F.R. 4418; 19 F.R. 4850; Reg. Secs. 728.410-728.424), the Secretary, acting through the Dauphin County Agricultural Conservation and Stabilization Committee, hereinafter referred to as "the committee", established a wheat acreage allotment of 16 acres for said farm for the 1954 crop of wheat and duly gave written notice thereof in accordance with law (7 U.S.C. 1362).

V.

In compliance with the Act and regulations (7 U.S.C. 1301(b)(13)(E); Reg. Sec. 728.453; 7 U.S.C. 1340; Reg. Secs. 728.451, 728.458, 728.459; 7 U.S.C. 1334; Reg. Secs. 728.410-728.424; 7 U.S.C. 1388), the committee determined for said farm for the 1954 crop of wheat the following facts:

Acreage of wheat	20 acres
Farm wheat acreage allotment	16 "
Excess acreage of wheat	4 "
Wheat normal yield per acre	21 bushels
Normal production of acreage allotment	336 "
Farm marketing excess of wheat	84 "

Written notice of said determinations of facts and that the farm marketing quota of wheat for the 1954 crop for the farm was the amount of wheat produced thereon in 1954, less the farm marketing excess, was duly issued and mailed to defendant by the committee on or about June 2, 1954 (7 U.S.C. 1340; Reg. Secs. 728.458, 728.459; 7 U.S.C. 1362; Reg Sec. 728.460). The notice informed defendant of the

provisions of law relating to a downward adjustment in the farm marketing excess and the review of the farm marketing quota or farm marketing excess or any determination made in connection therewith. Defendant failed to apply under the Act and regulations for a downward adjustment in the farm marketing excess determined for the farm (7 U.S.C. 1340; Reg. Sec. 728.461). Defendant further failed to apply for a review by a review committee of the farm marketing quota or farm marketing excess or any of the aforesaid determinations made in connection with said quota or excess as provided in the Act and regulations (7 U.S.C. 1363; Reg. Sec. 728.465).

VI.

In accordance with the requirements of the regulations (Reg. Secs. 728.461, 728.477, and 728.490) the Pennsylvania State Agricultural Stabilization and Conservation Committee, United States Department of Agriculture, determined for the 1954 crop year that the date on which the threshing of wheat is normally substantially completed in Dauphin County, Pennsylvania, is August 16, 1954 (20 F.R. 24). After the issuance of the notice referred to in paragraph V hereof the regulations were amended to provide that the penalty on the farm marketing excess of wheat for any farm should be remitted not later than sixty calendar days after the date on which the threshing of wheat is normally substantially completed in the county in which the farm is situated, as determined by the State committee, or January 31, 1955, whichever is the later, and to provide for appropriate credit for any portion of the farm marketing excess stored or delivered to the Secretary on or before the aforesaid applicable date (Reg. Sec. 728.477 (b), as amended, 20 F.R. 24).

VII.

The parity price per bushel of wheat, as of May 1, 1954, was $2.50, and under the provisions of the Act (7 U.S.C. 1952 ed. Supp. I, Sec. 1340(2)) the rate of penalty applicable to the 1954 crop of wheat is $1.12 per bushel (Reg. Sec. 728.475, as amended, 19 F.R. 2763).

VIII.

Defendant has failed to store or deliver to the Secretary any part of said farm marketing excess in accordance with the Act and regulations (7 U.S.C. 1340 (3); Reg. Secs. 728.482, 728.483). Under the Act and regulations the penalty applicable to the 1954 farm marketing excess of wheat determined for the farm is $94.08, and said sum was required to be paid by defendant not later than January 31, 1955. Under the Act and regulations the defendant and PAUL KEEFER of Millersburg, Pennsylvania, were producers of wheat on said farm Serial No. 2B-10 with respect to the 1954 crop on a 50-50 share basis. On or about April 12, 1955, PAUL KEEFER paid his one-half share of the penalty, $47.04. Defendant has failed to and refused to pay his one-half share of the penalty or any part thereof and no part of said one-half share of the penalty has otherwise been paid.

IX.

WHEREFORE, plaintiff demands judgment against defendant for the sum of $47.04, the costs of this action, and such other relief as this Court may deem just and proper in the premises.

UNITED STATES OF AMERICA

By (s) J. Julius Levy

United States Attorney

II.

ANSWER

And, now, comes the defendant, by his attorney, Andrew Wilson Green, whose address is 603 North Front Street, Harrisburg, Pennsylvania, and alleges in answer to the complaint in the above entitled civil action as follows:

1. Paragraph I of the complaint is admitted.

2. Paragraph II of the complaint is admitted.

3. Paragraph III of the complaint is admitted.

4. Paragraph IV of the complaint is answered as follows. It is admitted that the defendant received notification of 1954 wheat acreage allotment in a form similar to that set forth in Exhibit A, attached hereto and made a part hereof. However, the original notification was inadvertently destroyed by the defendant, and the defendant requested another copy of this notification from the Dauphin County Production and Marketing Administration Committee, who sent him a notification, a copy of which is attached hereto as Exhibit A. However, the defendant believes that the second notification sent to him differs from the first in that the first did not include the words "and for farm marketing quotas if marketing quotas are applicable for the 1954 wheat crop", and also "if marketing quotas are applicable to the 1954 crop of wheat," as underlined on the said Exhibit A, or any other words pertaining to quotas. Except as hereinabove stated, Paragraph 4 is admitted.

5. Paragraph V of the complaint is answered as follows: It is admitted that the defendant received notice of the determination of facts dated June 2, 1954, but it is to be noted that the said determination of facts was made before the harvesting of the wheat in question. It is admitted that the defendant failed to apply for a downward adjustment of the farm marketing excess, or any of the determinations of fact referred to in Paragraph V of the complaint.

6. Paragraph VI of the complaint is admitted.

7. Paragraph VII of the complaint is admitted.

8. Paragraph VIII of the complaint is answered as follows: It is admitted that the defendant failed to store or to deliver to the Secretary of Agriculture any part of the farm marketing excess. It is admitted that the penalty applicable to the 1954 farm marketing excess on the said farm is $94.08, and it is further admitted that Paul Keefer paid half of the said penalty, or $47.04, and it is further admitted that the defendant has not paid and has refused and continues to refuse to pay the said penalty sought to be enforced against him in the amount of $47.04. However, the defendant denies that as to him, the said Act and Regulations have the force of law.

9. The defendant denies that there is due and owing to the plaintiff the sum of $47.04, or any other sum, and further avers that there is no other relief to which the plaintiff is entitled to against the defendant.

NEW MATTER

10. The defendant, by reason of his religious training and belief, considers it morally wrong and contrary to

the teachings of the Holy Scriptures to limit the production of his farm so that his farm produces any lesser amount of food than it can, subject to the knowledge and judgment of farming which God has been pleased to give to the defendant in respect to the farming of his farm.

11. The enforcement of the Agricultural Adjustment Act of 1938, as against the defendant in the manner sought in the complaint, would be contrary to the First Amendment to the Constitution of the United States, which provides that "Congress shall make no law * * * prohibiting the free exercise (of religion) * * * *".

12. The Agricultural Adjustment Act of 1938, in respect to wheat quotas, is unlawful, inasmuch as Congress has no power to pass such an Act, under the provisions of clause 3, Section 8, Article I of the Constitution of the United States, or any other provision thereof.

13. The enforcement of the Agricultural Adjustment Act of 1938 is contrary to the provisions of the Fifth Amendment of the Constitution of the United States, which provides that "no person * * * shall * * * be deprived of life, liberty, or property, without due process of law", in the following respects:

(a) The failure of the enforcement of the wheat marketing provisions of the Agricultural Adjustment Act of 1938 to achieve the objectives set forth in the Act since its enactment to the present time, shows that the enforcement of the said Act bears no reasonable relationship to the objectives sought by it, and that its continued enforcement is contrary to due process of law.

(b) One of the incidents of property is the right to use it as the owner sees fit, subject only to the requirements of the public defense, the public health, welfare, and morals (the police power of the state), and the proper and special regulation of commerce, authorized to Congress by clause 3, Section 8, Article I of the Constitution of the United States. The management of a farm is not an object of or incident to interstate commerce, and therefore, the imposition of a penalty upon the owner thereof in respect to the management of a farm is a deprivation of property without due process of law.

14. Wherefore, the defendant prays (1) that the Court may hear testimony from the defendant concerning his religious training and beliefs, and from experts in the field of religion in respect to the support of the defendant's religious beliefs from the Holy Scriptures, and (2) that the Court may hear testimony from economic experts concerning the failure of the enforcement of the Agricultural Adjustment Act of 1938 to achieve the objects set forth in the Act since its enactment to the present time, and (3) to hear argument concerning the Constitutional questions raised by defendant's answer herein.

And the defendant will ever pray, etc.

Henry Kissinger, Defendant
By his Attorney:
Andrew Wilson Green

December 30, 1955

EXHIBIT A

Copy Copy

Form GR-308-WHEAT (1954)
(4-28-53)

SECOND RUN

UNITED STATES DEPARTMENT OF AGRICULTURE

Production and Marketing Administration

NOTIFICATION OF 1954 WHEAT ACREAGE ALLOTMENT

(State, County Code and farm serial no.) Penna-022-2B-10

(Acreage of land in farm) 109

(Date) 8/10/53

To: (Name and address of operator) Paul Keefer, Millersburg, Penna.

And to all other persons who as operator, landlord, tenant or sharecropper are interested in the above identified farm for which this acreage allotment is established.

A wheat allotment of 16 acres has been established for 1954 for this farm for the purposes of the price support provisions of the Agricultural Act of 1949 *and for farm marketing quotas if marketing quotas are applicable for the 1954 wheat crop.* If there has been any material change in the farm, this allotment shall not be effective; the allotment shall be redetermined by the county committee when such change becomes known to it; and a new notice of the revised allotment shall be given.

Answer
Exhibit A

THE COUNTY COMMITTEE SHOULD BE PROMPTLY INFORMED OF ANY CHANGES IN THE OWNERSHIP, OPERATION, OR CONTROL OF THE FARM IDENTIFIED ABOVE AND OF ANY CHANGES AS A RESULT OF DIVISION, SALE OR RENTING OF PART OF THE LAND OR PURCHASE OR RENTING OF ADDITIONAL LAND.

If any interested producer is dissatisfied with the acreage allotment shown above he may within 15 days after the mailing of this notice appeal for reconsideration of his allotment. The appeal and facts constituting a basis for such consideration must be submitted in writing to the address shown below.

If marketing quotas are applicable to the 1954 crop of wheat and any interested producer is dissatisfied with the acreage allotment shown above he may within 15 days after the mailing of this notice have such allotment reviewed by a local review committee of three farmers appointed by the Secretary of Agriculture. Any such application for review must be in writing and filed with the Secretary of the county committee at the address shown below in accordance with regulations prescribed by the Secretary of Agriculture (7 CFR 711.1-711.34). These regulations are available at the office of the county committee.

Carbon Copy to: (Owner)
Name ———— Adress ————
Henry Kissinger
Millersburg, Penna.

Dauphin County Production and Marketing Administration Committee Brotherhood Bldg., Harrisburg, Pa.

by (s) Wilmer Brubaker

III.

MOTION FOR SUMMARY JUDGMENT

To the Honorable, the Judges of Said Court:

J. Julius Levy, United States Attorney in and for the Middle District of Pennsylvania, attorney for Plaintiff, moves the Court to grant summary judgment against the Defendant and in favor of the plaintiff, pursuant to Rule 56 of the Federal Rules of Civil Procedure.

J. Julius Levy
United States Attorney
424 Post Office Building
Scranton 1, Penna.

Date: May 10, 1956

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MAY 5 1956
JOHN T. FEY, Clerk

No. 894

In the Supreme Court of the United States

OCTOBER TERM, 1955

HENRY KISSINGER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 894

HENRY KISSINGER, PETITIONER

v.

UNITED STATES OF AMERICA

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit (Pet. 28-32) is reported in 250 F. 2d 940. The opinion of the United States District Court for the Middle District of Pennsylvania (Pet. 24-27) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on January 8, 1958. The petition for certiorari was filed on April 4, 1958. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1) and 2101(c).

QUESTIONS PRESENTED

1. Whether it was error to grant the government's motion for summary judgment without affording the petitioner an opportunity to introduce evidence which, the petitioner contends, would show that the enforcement of the Agricultural Adjustment Act of 1938 has failed to accomplish the congressional purpose and, therefore, that its continued enforcement is unreasonable and is in violation of the due process clause of the Fifth Amendment.

2. Whether the provisions of the First Amendment relating to the free exercise of religion afford a basis for exempting the petitioner from the civil penalty requirements of the Agricultural Adjustment Act of 1938.

STATUTE INVOLVED

The relevant provisions of the Agricultural Adjustment Act of 1938, as amended, are set forth in Appendix C to the petition (Pet. 33-36).

STATEMENT

This action was instituted to recover the civil penalty imposed by the Agricultural Adjustment Act of 1938 on petitioner's 1954 "farm marketing excess" of wheat. The petitioner admits that he planted and harvested wheat in 1954 in excess of the wheat acreage allotment established for his farm, that he has not stored or delivered to the Secretary of Agriculture any part of such excess, and that he has refused to pay the statutory penalties thereon, amounting to $47.04 (Pet. 37-43). The petitioner also admits that he did not apply for a downward adjustment of his farm marketing excess, or for an administrative review of the farm

marketing quota or farm marketing excess determined for the farm (Pet. 37-43).

The district court found that there was no genuine issue as to any material fact and granted the government's motion for summary judgment (Pet. 24-27). The court of appeals unanimously affirmed this judgment (Pet. 28-32).

ARGUMENT

1. The petitioner's contention that the enforcement of the Agricultural Adjustment Act of 1938 has failed to accomplish the purposes of the Act does not raise an issue of fact precluding grant of the government's motion for summary judgment. It is settled that questions relating to the "wisdom, need, and effectiveness of a particular [legislative] project" are "questions for the Congress, not the courts." *Oklahoma* v. *Atkinson Co.*, 313 U.S. 508, 527. See also, *Arizona* v. *California*, 283 U.S. 423, 456; *Everard's Breweries* v. *Day*, 265 U.S. 545, 559; *Chicago, B. & Q. R. R. Co.* v. *McGuire*, 219 U.S. 549, 569. This petition presents no basis for reviewing this well established principle.

2. The statutory provisions for setting wheat marketing quotas were reviewed, *in extenso*, in *Wickard* v. *Filburn*, 317 U.S. 111, 118-129, and upheld as a valid exercise of the power of Congress to regulate commerce. The Act does not prohibit the production of wheat; the civil penalties of "45 per centum of the parity price per bushel of wheat" relate solely to the farm marketing excess of wheat. 7 U.S.C. Supp. V, 1340(2). Petitioner may produce as much wheat as he chooses and he may market as much of his production as he chooses. The only limitation is a civil penalty on the farm marketing excess. 7 U.S.C. Supp. V, 1340(2). Moreover,

the civil penalty may be postponed or avoided by storing the farm marketing excess or delivering it to the Secretary. 7 U.S.C. Supp. V, 1340(3).[1]

Since no penalty is imposed for "planting wheat," there is no basis for petitioner's contention based on the First Amendment. In addition, freedom of religion does not, under the First Amendment, include freedom from the kind of regulation here involved. *Prince* v. *Massachusetts*, 321 U.S. 158, 163-171; *Davis* v. *Beason*, 133 U.S. 333, 342-345; *Mitchell* v. *Pilgrim Holiness Church Corp.*, 210 F. 2d 879, 882-885 (C.A. 7), certiorari denied, 347 U.S. 1013. Clearly the First Amendment affords no basis for exempting the petitioner from the requirement that he pay a civil penalty on his farm marketing excess of wheat.

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[1] See also *United States* v. *Mumma*, 237 F. 2d 705 (C.A. 5), certiorari denied, 352 U.S. 1003, and *Miller* v. *United States*, 242 F. 2d 392 (C.A. 6), certiorari denied, 355 U.S. 833, in which attacks on the constitutionality of the civil penalty imposed by the Agricultural Adjustment Act for the production and marketing of wheat in excess of the farm marketing quota were rejected.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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